TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No 250.

THE PINE RIVER LOGGING AND IMPROVEMENT COMPANY ET AL., PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

FILED FEBRUARY 11, 1901.

(18,051.)

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a Pleas and proceedings in the United States circuit court of appeals for the eighth circuit at the December term, 1900, of said court, begun and held at the United States court-house in the city of St. Louis, Missouri, on the first Monday in December, to wit: the third day of December, A. D. 1900, before the Honorable Henry C. Caldwell, Honorable Walter H. Sanborn and Honorable Amos M. Thayer, circuit judges.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

Attest: JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it remembered that heretofore, to wit: on the twenty-ninth day of September, A. D. 1900, a transcript of record, pursuant to a writ of error directed to the circuit court of the United States for the district of Minnesota, was filed in the office of the clerk of the United States circuit court of appeals for the eighth circuit, in a certain cause wherein The Pine River Logging and Improvement Company, *et al.*, were plaintiffs in error, and The United States of America was defendant in error, which said transcript of record is in the words and figures following, to wit:

1 UNITED STATES OF AMERICA:

Pleas before the honorable the judges of the circuit court of the United States of America for the district of Minnesota, of the June term, A. D. 1900, *term* of said court, held in the city of Saint Paul, in said district, in the year 1900.

UNITED STATES OF AMERICA, Plaintiff,
vs.
THE PINE RIVER LOGGING AND IMPROVEMENT COMPANY, a Corporation; Joel B. Bassett and William L. Bassett, Copartners as J. B. Bassett & Company, and John S. Pillsbury and Charles A. Smith, Copartners as C. A. Smith and Company, Defendants.

DISTRICT OF MINNESOTA, *ss:*

Be it remembered that on the 28th day of June, A. D. 1895, came the plaintiff by its attorney and filed in the clerk's office of said court, its bill of complaint, which is in words and figures as follows, to wit:

UNITED STATES OF AMERICA,
District of Minnesota.

In the Circuit Court, Fourth Division.

UNITED STATES OF AMERICA, Plaintiff,
vs.
PINE RIVER LOGGING AND IMPROVEMENT COMPANY, a Corporation; Joel B. Bassett and William L. Bassett, Copartners as J. B. Bassett & Company, and John S. Pillsbury and Charles A. Smith, Copartners as C. A. Smith and Company, Defendants.

Plaintiff complains and alleges:

I.

1st. That at all the times hereinafter mentioned, the defendant, The Pine River Logging and Improvement Company, was, and now is, a corporation duly organized and existing under the laws of the State of Minnesota.

2nd. That the defendants, Joel B. Bassett and William L. Bassett, were, at all such times, and now are, copartners and dealers in lumber under the firm name of J. B. Bassett & Company, doing business in the city of Minneapolis in said district.

3rd. That at all such times said John S. Pillsbury and said Charles A. Smith, were, and now are, copartners and dealers in lumber, doing business under the firm name of C. A. Smith and Company in the city of Minneapolis in said district.

2

4th. That on or about the 15th day of December, 1891, one George Lydick, with the consent and at the request of defendants, did wrongfully enter upon certain lands owned by, and the property of the United States, to wit: upon sections twenty-one (21), twenty-two (22), twenty-seven (27), twenty-eight (28), thirty-three (33), and thirty-four (34), township one hundred and forty-five (145), north of range twenty-five (25) and sections twenty-three (23), twenty-four (24), twenty-five (25), twenty-six (26), and thirty-six (36), township one hundred and forty-six (146), north of range thirty (30), and section thirty (30), township one hundred and forty-six (146), north of range twenty-nine (29), all west of the fifth principal meridian, in said district; that said lands were then and there a part and portion of an Indian reservation, to wit: the Mississippi Indian reservation, and set apart for the exclusive use, occupancy and benefit of certain Indians, to wit: the Mississippi band of Chippewa Indians; that thereupon and between said last-mentioned day and the 30th day of April, 1892, with the full knowledge and consent, and at the special instance and request of said defendants, said Lydick did wrongfully, willfully and unlawfully fell, cut into logs and remove and cause to be felled, cut into logs and removed a great number of pine trees then and there upon said land; that thereafter and within said district, said Lydick did deliver and cause to be delivered, said

logs to defendants; that a portion of said logs were bark-marked H|XT and stamp-marked [illegible], and others were bark-marked E|B and stamp-marked CAS; that thereafter said defendants did drive and boom said logs to the city of Minneapolis in said district, and did there, prior to the commencement of this action, but at a time which is not and cannot now be exactly known to this plaintiff, convert and manufacture the same into four million sixty thousand (4,060,000) feet of lumber; that the value of said lumber was then and there eighty-five thousand two hundred and sixty (85,260) dollars, and said defendants did then and there convert and dispose of the same to their own use, to the damage of the plaintiff in the sum of eighty-five thousand two hundred and sixty (85,260) dollars; that said trees, logs and lumber were, at all the aforementioned times, and now are, the property of the plaintiff, and this plaintiff was at all such times, and now is, entitled to the immediate possession of the same.

3 5th. That plaintiff has necessarily expended the sum of one thousand (1,000) dollars in finding, identifying and seeking to recover the timber and lumber so converted by the defendants.

II.

Further complaining, and for a second cause of action, plaintiff: 1st. Reaffirms each and every allegation, matter and thing in the first three paragraphs of its first cause of action herein contained.

2nd. Plaintiff further alleges that on or about the 1st day of December, 1891, one William Fairbanks, with the consent and at the request of defendants, did wrongfully enter upon certain lands owned by and the property of the United States, to wit: upon lots three (3) and eight (8), section thirty-two (32), township one hundred and forty-six (146), north of range twenty-six (26), and sections one (1), two (2), three (3), four (4), five (5), six (6), seven (7), eight (8), nine (9), ten (10), eleven (11), and twelve (12), township one hundred and forty-five (145), north of range twenty-seven (27), and sections twenty-eight (28), twenty-nine (29), thirty-one (31), thirty-two (32), and thirty-three (33), township one hundred and forty-six (146), north of range twenty-seven (27), and sections twenty-five (25), twenty-six (26), twenty-seven (27), twenty-eight (28), thirty-three (33), thirty-four (34), and thirty-five (35), township one hundred and forty-six (146), north of range twenty-nine (29), all west of the fifth principal meridian, in said district; that said lands were then and there a part and portion of an Indian reservation, to wit: the Mississippi Indian reservation, and set apart for the exclusive use, occupancy and benefit of certain Indians, to wit: the Mississippi band of Chippewa Indians; that thereupon and between said last-mentioned day and the 30th day of April, 1892, with the full knowledge and consent, and at the special instance and request of said defendants, said Fairbanks did willfully, wrongfully and unlawfully fell, cut into logs and remove and cause to be felled, cut into logs and

removed a great number of pine trees, all then and there upon said land; that thereafter and within said district, said Fairbanks did deliver and cause to be delivered said logs to defendants; that a portion of said logs were bark-marked H|XT and stamp-marked [illegible], and others were bark-marked E|B and stamp-marked CAS; that thereafter said defendants did drive and
4 boom said logs to the city of Minneapolis in said district, and did there, prior to the commencement of this action, but at a time which is not and cannot now be exactly known to this plaintiff, convert and manufacture the same into four million nine hundred and ninety-seven thousand eight hundred and fifty-three (4,997,853) feet of lumber, and that the value of said lumber was then and there one hundred and four thousand nine hundred and fifty four and $\frac{91}{100}$ (104,954.91) dollars, and said defendants did then and there convert and dispose of the same to their own use, to the damage of the plaintiff in the sum of one hundred and four thousand nine hundred and fifty-four and $\frac{91}{100}$ (104,954.91) dollars; that said trees, logs and lumber were, at all the aforementioned times, and now are, the property of the plaintiff, and this plaintiff was at all such times, and now is, entitled to the immediate possession of the same.

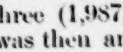
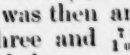
3rd. That plaintiff has necessarily expended the sum of one thousand two hundred (1,200) dollars in finding, identifying and seeking to recover the timber and lumber so converted by the defendants.

III.

Further complaining, and for a third cause of action, plaintiff:

1st. Reaffirms each and every allegation, matter and thing in the first three paragraphs of its first cause of action herein contained.

2nd. Plaintiff further alleges that on or about the 1st day of December, 1891, John Lyons and James Wakefield, with the consent and at the request of defendants, did wrongfully enter upon certain lands owned by and the property of the United States, to wit: upon sections twenty-nine (29), thirty (30), and thirty-two (32), township one hundred and forty-six (146), north of range twenty-six (26), and sections thirteen (13), fourteen (14), twenty-one (21), twenty-two (22), twenty-three (23), twenty-four (24), twenty-six (26), twenty-seven (27), and twenty-eight (28), township one hundred and forty-five (145), north of range twenty-seven (27), and sections eighteen (18), nineteen (19), and thirty (30), township one hundred and forty-six (146), north of range twenty-nine (29), and sections thirteen (13), fourteen (14), twenty-three (23), twenty-four (24), township one hundred and forty-six (146), north of range thirty (30), all west of the fifth principal meridian, in said district; that said lands were then and there a part and portion of an Indian reservation, to wit: the Mississippi Indian reservation, and set apart for the exclusive use, occupancy and benefit of certain Indians, to wit: the Mississippi band of
5 Chippewa Indians; that thereupon and between said last-mentioned day and the 30th day of April, 1892, with the full

knowledge and consent, and at the special instance and request of said defendants, said Lyons and Wakefield did wilfully, wrongfully and unlawfully fell, cut into logs and remove and cause to be felled, cut into logs and removed a great number of pine trees, all then and there upon said land; that thereafter and within said district, said Lyons and Wakefield did deliver and caused to be delivered, said logs to defendants; that a portion of said logs were bark-marked  , and stamp-marked  , and others were bark-marked  and stamp-marked  ; that thereafter said defendants did drive and boom said logs to the city of Minneapolis in said district, and did there, prior to the commencement of this action, but at a time which is not and cannot now be exactly known to this plaintiff, convert and manufacture the same into one million nine hundred and eighty-seven thousand three hundred and twenty-three (1,987,323) feet of lumber; that the value of said lumber was then and there forty-one thousand seven hundred and thirty-three and $\frac{78}{100}$ (41,733.78) dollars, and said defendants did then and there convert and dispose of the same to their own use to the damage of the plaintiff in the sum of forty-one thousand seven hundred and thirty-three and $\frac{78}{100}$ (41,733.78) dollars; that said trees, logs and lumber were, at all the aforementioned times, and now are, the property of the plaintiff, and this plaintiff was at all such times, and now is, entitled to the immediate possession of the same.

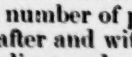
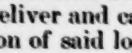
3rd. That plaintiff has necessarily expended the sum of five hundred (500) dollars in finding, identifying and seeking to recover the timber and lumber so converted by the defendants.

IV.

Further complaining, and for a fourth cause of action, plaintiff:

1st. Reaffirms each and every allegation, matter and thing in the first three paragraphs of its first cause of action herein contained.

2nd. Plaintiff further alleges that on or about the 1st day of December, 1891, Scho-cag-e-sic and George Galbreath, with the consent and at the request of defendants, did wrongfully enter upon certain lands owned by and the property of the United States, to wit: upon
6 sections five (5) and six (6), township one hundred and forty-six (146), north of range twenty-six (26), and sections thirty (30), thirty-one (31), and thirty-two (32), township one hundred and forty-seven (147), north of range twenty-six (26), and sections one (1), two (2), and three (3), township one hundred and forty-six (146), north of range twenty-seven (27), and sections twenty-five (25), twenty-six (26), thirty-five (35), and thirty-six (36), township one hundred and forty-seven (147), north of range twenty-seven (27), all west of the fifth principal meridian, in said district; that said lands were then and there a part and portion of an Indian reservation, to wit: the Winnibigoshish Indian reservation, and set apart for the exclusive use, occupancy and benefit of certain Indians, to wit: the Mississippi band of Chippewa Indians; that there-

upon and between said last-mentioned day and the 30th day of April, 1892, with the full knowledge and consent, and at the special instance and request of said defendants, said Scho-cag-e-sic and Galbreath did wilfully, wrongfully and unlawfully fell, cut into logs and remove and cause to be felled, cut into logs and removed a great number of pine trees, all then and there upon said land; that thereafter and within said district, said Scho-cag-e-sic and Galbreath did deliver and cause to be delivered said logs to defendants; that a portion of said logs were bark-marked  and stamp-marked  and others were bark-marked and stamp-marked  ; that thereafter said defendants did drive and boom said logs to the city of Minneapolis in said district, and did there, prior to the commencement of this action, but at a time which is not and cannot be exactly known to this plaintiff, convert and manufacture the same into two million two hundred and seven thousand three hundred and five (2,207,305) feet of lumber, and that the value of said lumber was then and there forty-six thousand three hundred and fifty-three and $\frac{40}{100}$ (46,353.40) dollars, and said defendants did then and there convert and dispose of the same to their own use to the damage of the plaintiff in the sum of forty-six thousand three hundred and fifty-three and $\frac{40}{100}$ (46,353.40) dollars; that said trees, logs and lumber were, at all the aforementioned times, and now are, the property of the plaintiff, and this plaintiff was at all such times, and now is, entitled to the immediate possession of the same.

3rd. That plaintiff has necessarily expended the sum of five hundred (500) dollars in finding, identifying and seeking to recover the timber and lumber so converted by the defendants.

V.

Further complaining and for a fifth cause of action, plaintiff:

7 1st. Reaffirms each and every allegation, matter and thing in the first three paragraphs of its first cause of action herein contained.

2nd. Plaintiff further alleges that on or about the 1st day of December, 1891, one Charles Losh, with the consent and at the request of defendants, did wrongfully enter upon certain lands owned by and the property of the United States, to wit: upon sections six (6) and seven (7), township one hundred and forty-four (144), north of range twenty-five (25), and section thirty-one (31), township one hundred and forty-five (145), north of range twenty-five (25), and sections two (2), three (3), four (4), ten (10), eleven (11), twenty-seven (27), twenty-eight (28), twenty-nine (29), thirty (30), thirty-one (31), thirty-two (32), thirty-three (33), thirty-four (34), thirty-five (35), and thirty-six (36), township one hundred and forty-five (145), north of range twenty-six (26), and sections one (1), two (2), three (3), four (4), ten (10), eleven (11), and twelve (12), township one hundred and forty-four (144), north of range twenty-six (26), west of the fifth principal meridian, in said district, that said lands were then and there a part and portion of an Indian reservation, to wit: the Mis-

sissippi Indian reservation, and set apart for the exclusive use, occupancy and benefit of certain Indians, to wit: the Mississippi band of Chippewa Indians; that thereupon and between said last-mentioned day and the 30th day of April, 1892, with the full knowledge and consent and at the special instance and request of said defendants, said Losh did wilfully, wrongfully and unlawfully fell, cut into logs and remove and cause to be felled, cut into logs and removed a great number of pine trees then and there upon said land; that thereafter and within said district, said Losh did deliver and cause said logs to be delivered to defendants; that a portion of said logs were bark-marked EA and stamp-marked E and others were bark-marked EIB and stamp-marked CAS; that thereafter said defendants did drive and boom said logs to the city of Minneapolis, in said district, and did there, prior to the commencement of this action, but at a time which is not, and cannot now be exectly known this plaintiff, convert and manufacture the same into four million forty-one thousand (4,041,000) feet of lumber; that the value of said lumber was then and there eighty-four thousand eight hundred and sixty-one (84,861) dollars, and said defendants did then and there convert and dispose of the same to their own use to the damage of the plaintiff in the sum of eighty-four thousand eight hundred and sixty-one (84,861) dollars; that said trees, logs and lumber were, at all the aforementioned
8 times, and now are, the property of the plaintiff, and this plaintiff was at all such times, and now is, entitled to the immediate possession of the same.

3rd. That plaintiff has necessarily expended the sum of one thousand (1,000) dollars in finding, identifying and seeking to recover the timber and lumber so converted by the defendants.

VI.

Further complaining, and for a sixth cause of action, plaintiff:

1st. Reaffirms each and every allegation, matter and thing in the first three paragraphs of its first cause of action herein contained.

2nd. Plaintiff further alleges that on or about the 1st day of December, 1891, one John Tuttle, with the consent and at the request of defendants, did wrongfully enter upon certain lands owned by and the property of the United States, to wit: upon sections thirty (30) and thirty-one (31), township one hundred and forty-five (145), north of range twenty-seven (27), and sections seventeen (17), twenty (20), twenty-one (21), twenty-two (22), twenty-five (25), twenty-six (26), twenty-seven (27), and twenty-eight (28), twenty-nine (29), and thirty-six (36), township one hundred and forty-five (145), north of range twenty-eight (28), all west of the fifth principal meridian, in said district; that said lands were then and there a part and portion of an Indian reservation, to wit: the Mississippi Indian reservation, and set apart for the exclusive use, occupancy and benefit of certain Indians, to wit: the Mississippi band of Chippewa Indians; that thereupon and between said last-mentioned day and the 30th day of April, 1892, with the full knowledge and

consent, and at the special instance and request of said defendants, said Tuttle did wilfully, wrongfully and unlawfully fell, cut into logs and remove and cause to be felled, cut into logs and removed a great number of pine trees, all then and there upon said land; that thereafter and within said district, said Tuttle did deliver and cause said logs to be delivered to defendants; that said logs were bark-marked JONX and stamp-marked TP; that thereafter said defendants did drive and boom said logs to the city of Minneapolis in said district, and did there, prior to the commencement of this action, but at a time which is not, and cannot now be exactly known to this plaintiff, convert and manufacture the same into two million sixty-four thousand four hundred and eighty-three (2,064,483) feet of lumber; that the value of said lumber was then and there forty-three thousand three hundred and fifty-four and $\frac{14}{100}$ (43,354.14) dollars, and said defendants did then and there convert and
9 dispose of the same to their own use to the damage of the plaintiff in the sum of forty-three thousand three hundred and fifty-four and $\frac{14}{100}$ (43,354.14) dollars; that said trees, logs and lumber were at all the aforementioned times, and now are, the property of the plaintiff, and this plaintiff was at all such times, and now is, entitled to the immediate possession of the same.

3rd. That plaintiff has necessarily expended the sum of five hundred (500) dollars in finding, identifying and seeking to recover the timber and lumber so converted by the defendants.

VII.

Further complaining, and for a seventh cause of action, plaintiff:

1st. Reaffirms each and every allegation, matter and thing in the first three paragraphs of its first cause of action herein contained.

2nd. Plaintiff further alleges that on or about the 1st day of December, 1891, William Bonga, and Peter Bonga, with the consent and at the request of defendants, did wrongfully enter upon certain lands owned by and the property of the United States, to wit: upon section six (6), township one hundred and forty-four (144), north of range twenty-eight (28), and sections thirty (30) and thirty-one (31), township one hundred and forty-five (145), north of range twenty-eight (28), and sections one (1) and twelve (12), township one hundred and forty-four (144), north of range twenty-nine (29), and section thirty-six (36), township one hundred and forty-five (145), north of range twenty-nine (29), all west of the fifth principal meridian, in said district; that said lands were then and there a part and portion of an Indian reservation, to wit: the Mississippi Indian reservation, and set apart for the exclusive use, occupancy and benefit of certain Indians, to wit: the Mississippi band of Chippewa Indians; that thereupon and between said last-mentioned day and the 30th day of April, 1892, with the full knowledge and consent, and at the special instance and request of said defendants, said Bongas did wilfully, wrongfully and unlawfully fell, cut into logs and remove and cause to be felled, cut into logs and removed a great number of pine trees, all then and there upon said land; that thereafter and within said

district, said Bongas did deliver and cause said logs to be delivered to defendants; that a portion of said logs were bark-marked *R' and stamp-marked R and others were bark-marked E|B and stamp-marked CAS; that thereafter said

10 defendants did drive and boom said logs to the city of Minneapolis, in said district, and did there, prior to the commencement of this action, but at a time which is not and cannot now be exactly known to this plaintiff, convert and manufacture the same into one million three hundred and seventeen thousand five hundred and sixty-six (1,317,566) feet of lumber; that the value of said lumber was then and there twenty-seven thousand six hundred and sixty-eight and $\frac{88}{100}$ (27,668.88) dollars, and said defendants did then and there convert and dispose of the same to their own use to the damage of the plaintiff in the sum of twenty-seven thousand six hundred and sixty-eight and $\frac{88}{100}$ (27,668.88) dollars; that said trees, logs and lumber were, at all the aforementioned times, and now are, the property of the plaintiff, and this plaintiff was at all such times, and now is, entitled to the immediate possession of the same.

3rd. That plaintiff has necessarily expended the sum of three hundred (300) dollars in finding, identifying and seeking to recover the timber and lumber so converted by the defendants.

VIII.

Further complaining, and for an eighth cause of action, plaintiff;

1st. Reaffirms each and every allegation, matter and thing in the first three paragraphs of its first cause of action herein contained.

2nd. Plaintiff further alleges that on or about the 1st day of December, 1891, one Jack Bonga, with the consent and at the request of defendants did wrongfully enter upon certain lands owned by and the property of the United States, to wit: upon sections one (1), two (2), three (3), four (4), five (5), and six (6), township one hundred and forty-three (143), north of range twenty-seven (27), and sections three (3), four (4), five (5), six (6), eight (8), nine (9), ten (10), fifteen (15), sixteen (16) and seventeen (17), township one hundred and forty-four (144), north of range twenty-seven (27), all west of the fifth principal meridian, in said district; that said lands were then and there a part and portion of an Indian reservation, to wit: the Mississippi Indian reservation, and set apart for the exclusive use, occupancy and benefit of certain Indians, to wit: the Mississippi band of Chippewa Indians; that thereupon and between said last-mentioned day and the 30th day of April, 1892, with the full knowledge and consent, and at the special instance and request of said defendants, said Bonga did wilfully, wrongfully and unlawfully fell, cut into logs and remove and cause to be felled, cut into logs and removed a great

11 number of pine trees, all then and there upon said land; that thereafter and within said district, said Bonga did deliver and

cause said logs to be delivered to defendants; that a portion of said logs were bark-marked *R' and stamp-marked R and others were bark-marked E|B and stamp-marked CAS; that thereafter said defendants did drive and boom said logs to the city of Minneapolis in said district, and did there, prior to the commencement of this action, but at a time which is not, and cannot now be exactly known to this plaintiff, convert and manufacture the same into one million two hundred and ninety-three thousand one hundred and fifty-four (1,293,154) feet of lumber; that the value of said lumber was then and there twenty-seven thousand one hundred and fifty-six and $\frac{23}{100}$ (27,156.23) dollars, and said defendants did then and there convert and dispose of the same to their own use to the damage of the plaintiff in the sum of twenty-seven thousand one hundred and fifty-six and $\frac{23}{100}$ (27,156.23) dollars; that said trees, logs and lumber were, at all the aforementioned times, and now are, the property of the plaintiff, and this plaintiff was at all such times, and now is, entitled to the immediate possession of the same.

3rd. That plaintiff has necessarily expended the sum of three hundred (300) dollars in finding, identifying and seeking to recover the timber and lumber so converted by the defendants.

IX.

Further complaining and for a ninth cause of action, plaintiff:

1st. Reaffirms each and every allegation, matter and thing in the first three paragraphs of its first cause of action herein contained.

2nd. Plaintiff further alleges that on or about the 1st day of March, 1891, one Clark Clay, with the consent and at the request of defendants, did wrongfully enter upon certain lands owned by and the property of the United States, to wit: upon sections thirty (30) and thirty-one (31) township one hundred and forty-five (145), north of range twenty-seven (27), and sections twenty-five (25), twenty-six (26) and thirty-six (36), township one hundred and forty-five (145), north or range twenty-eight (28), all west of the fifth principal meridian, in said district; that said lands were then and there a part and portion of an Indian reservation, to wit: the Mississippi Indian reservation, and set apart for the exclusive use, occupancy and
12 benefit of certain Indians, to wit: the Mississippi band of Chippewa Indians; that thereupon and between said last-mentioned day and the 30th day of April, 1892, with the full knowledge and consent, and at the special instance and request of said defendants, said Clay did wilfully, wrongfully and unlawfully fell, cut into logs and remove and cause to be felled, cut into logs and removed a great number of pine trees, all then and there upon said land; that thereafter and within said district, said Clay did deliver and cause said logs to be delivered to defendants; that thereafter said defendants did drive and boom said logs to the city of Minneapolis in said district, and did there, prior to the commencement of this action, but at a time which is not, and cannot now be exactly

known to this plaintiff, convert and manufacture the same into thirty-seven thousand two hundred and thirty-seven (37,237) feet of lumber; that the value of said lumber was then and there seven hundred and eighty-two (782) dollars, and said defendants did then and there convert and dispose of the same to their own use to the damage of the plaintiff in the sum of seven hundred and eighty-two (782) dollars; that said trees, logs and lumber were at all the aforementioned times, and now are the property of the plaintiff, and this plaintiff was at all such times and now is entitled to the immediate possession of the same.

3rd. That plaintiff has necessarily expended the sum of fifty (50) dollars in finding, identifying and seeking to recover the timber and lumber so converted by the defendants.

Wherefore, plaintiff demands judgment against the defendants, and each of them, for the sum of four hundred and sixty-seven thousand, four hundred and seventy-four and $\frac{34}{100}$ (467,474.34) dollars, and interest thereon from the time of such conversions, together with the costs and disbursements of this action.

JOHN E. STRYKER,
Special Ass't U. S. Attorney, Attorney for Plaintiff.

UNITED STATES OF AMERICA, }
District of Minnesota. }

Office of the clerk of the circuit court.

John E. Stryker came before me personally, and having been duly sworn, doth depose and say, that he is a special assistant United States attorney for said district, duly appointed and qualified to prosecute the above-entitled action; that he has read the foregoing complaint and knows the contents thereof, and that the same is true, except as to matters therein stated upon his information and belief, and that as to such matters he believes them to be true.

JOHN E. STRYKER.

13 Subscribed and sworn to before me this 28th day of June, A. D. 1895.

OSCAR B. HILLIS,
Clerk U. S. Circuit Court, District of Minnesota.

[Seal U. S. Circuit Court.]

Indorsed: Filed June 28, 1895. Oscar B. Hillis, clerk. By R. C. Mabey, deputy.

Thereafter and on the same day the following præcipe for summons was filed of record in said cause, to wit:

ST. PAUL, MINN., *June 28th*, 1895.

UNITED STATES OF AMERICA,
District of Minnesota.

In the Circuit Court, Fourth Division.

UNITED STATES OF AMERICA, Plaintiff,
vs.
PINE RIVER LOGGING AND IMPROVEMENT COMPANY, a Corporation; Joel B. Bassett and William L. Bassett, Copartners as J. B. Bassett & Company, and John S. Pillsbury and Charles A. Smith, Copartners as C. A. Smith and Company, Defendants.

Oscar B. Hillis, Esq., clerk of circuit court, district of Minnesota.

DEAR SIR: Please issue summons for the Pine River Logging and Improvement Company, Joel B. Bassett, William L. Bassett, John S. Pillsbury and Chas. A. Smith, in the above-entitled action.

Yours respectfully, JOHN E. STRYKER,
Special Ass't U. S. Attorney.

To deputy clerk, 4th division:

Please place 4th division seal on original summons signed by Mr. Hillis and certify copies as true.

J. E. STRYKER.

Indorsed: Præcipe for summons. Filed June 28th, 1895. Oscar B. Hillis, clerk. By Robert C. Mabey, deputy.

Thereupon said clerk duly issued out of said court under the seal thereof the following summons, to wit:

14 UNITED STATES OF AMERICA,
District of Minnesota, 4th Division.

In the Circuit Court of the United States for the District of Minnesota.

UNITED STATES OF AMERICA, Plaintiff,
against
PINE RIVER LOGGING AND IMPROVEMENT COMPANY, a Corporation; Joel B. Bassett and William L. Bassett, Copartners as J. B. Bassett & Company, and John S. Pillsbury and Charles A. Smith, Copartners as C. A. Smith and Company, Defendants. } Summons.

The President of the United States of America to the defendants above named, Greeting:

You are hereby summoned and required to answer the complaint in this action, which has been filed in the office of the clerk of this court, in Minneapolis, county of Hennepin, and State of Minnesota, and file your answer in said clerk's office, within twenty days after the service hereof, excluding the day of such service, and if you fail to answer the complaint as aforesaid, the plaintiff will have the

amount it is entitled to recover ascertained by the court, or under its direction, and take judgment for the amount so ascertained, besides the costs and disbursements of this action.

For the marshal of the district of Minnesota to execute.

Witness, the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this 28th day of June, A. D. 1895. Issued at my office in the city of Minneapolis, under the seal of said circuit court, the day and year last aforesaid.

[Seal U. S. Cir. Court.]

OSCAR B. HILLIS, *Clerk.*

JOHN E. STRYKER,
Plaintiff's Attorney.

UNITED STATES OF AMERICA, *District of Minnesota,* } ss:

I hereby certify and return that I served the annexed summons on the therein-named defendant Pine River Logging and Improvement Company, a corporation, by handing to and leaving a true and correct copy thereof with C. A. Smith, the secretary of said defendant corporation, personally at Minneapolis, in said district on the 28th day of June, A. D. 1895.

R. T. O'CONNOR,
U. S. Marshal,
By J. M. REDDING, *Deputy.*

15 UNITED STATES OF AMERICA, *District of Minnesota,* } ss:

I hereby certify and return that I served the annexed summons on the therein-named defendants, Joel B. Bassett and William L. Bassett, copartners as J. B. Bassett & Company, and John S. Pillsbury and Charles A. Smith, copartners as C. A. Smith & Company, by handing to and leaving a true and correct copy thereof with them and each of them personally at Minneapolis, in said district on the 28th day of June, A. D. 1895.

R. T. O'CONNOR,
U. S. Marshal,
By J. M. REDDING, *Deputy.*

Indorsed: Returned and filed June 29, A. D. 1895. Oscar B. Hillis, clerk. By R. C. Mabey, deputy.

Thereafter and on the 15th day of August, 1895, the following stipulation extending time to answer was filed of record in said cause, to wit:

And thereafter on Aug. 15th, the following stipulation extending time to answer was filed of record in said cause, to wit:

UNITED STATES OF AMERICA, }
District of Minnesota. }

In the Circuit Court, Fourth Division.

UNITED STATES OF AMERICA, Plaintiff,
vs.
PINE RIVER LOGGING AND IMPROVEMENT COMPANY, JOEL B. Bassett and William L. Bassett, Copartners as J. B. Bassett & Company, and John S. Pillsbury and Charles A. Smith, Copartners as C. A. Smith and Company, Defendants.

It is hereby stipulated by and between the parties to the above-entitled action, that the time wherein the defendants are required to answer the complaint in said action may be and the same is hereby extended to the 15th day of August, A. D. 1895.

JOHN E. STRYKER,
Attorney for Plaintiff.
EUGENE G. HAY,
Attorney for Defendants.

Indorsed: Stipulation extending time to answer. Filed August 15th, 1895. Oscar B. Hillis, clerk. By Robert C. Mabey, deputy.

16 And on the same day the following answer of the Pine River Logging and Improvement Co. was filed of record in said cause, to wit:

UNITED STATES OF AMERICA, }
District of Minnesota. }

In the Circuit Court, Fourth Division.

UNITED STATES OF AMERICA, Plaintiff,
vs.
PINE RIVER LOGGING AND IMPROVEMENT COMPANY, a Corporation; Joel B. Bassett and William L. Bassett, Copartners as J. B. Bassett & Company, and John S. Pillsbury and Charles A. Smith, Copartners as C. A. Smith & Company, Defendants.

Separate Answer of Pine River Logging and Improvement Company.

For its separate answer to the complaint herein, defendant Pine River Logging and Improvement Company admits the allegations contained in paragraphs designated 1st and 2nd of the first page of said complaint.

As to the paragraph designated as 3rd on said first page of said complaint, this defendant is informed and believes and therefore alleges that the said copartnership of C. A. Smith & Co. was dissolved on or about May 1st, 1893, and defendant denies that said John S. Pillsbury and Charles A. Smith are or ever since said last-named date have been partners.

Answering the 1st, 2nd and 3rd causes of action set out in said

complaint, this defendant alleges that in or about the month of October, A. D. 1891, pursuant to an act of the Congress of the United States entitled "An act in relation to dead and fallen timber on Indian lands," approved February 16th, 1889 and being chapter 172, volume 25, of the Statutes at Large of the United States, this defendant entered into a contract with one William Fairbanks, an Indian then belonging to and residing on the Indian reservation mentioned and described in said causes of action, whereby said Indian agreed to cut, haul and deliver during the season of 1891–'92, on certain waters of the Mississippi river, a certain quantity of pine saw-logs to be cut on said Indian reservation from dead and down timber, and to deliver said logs when so cut to this defendant, and this defendant agreed to pay for the timber which should be cut and scaled under said contract, the sum of four and $\frac{50}{100}$ dollars ($4.50) per thousand feet. That prior to the making of said contract the President of the United States, pursuant to said act above recited, had prescribed certain regulations to govern the logging by
17 Indians residing on said reservation. That said contract was in due form of law and contained all the provisions required by said act and said regulations, and was duly executed by this defendant and the said Indian, and on or about November 27th, 1891, was duly approved by the President of the United States, the Secretary of the Interior and the Commissioner of Indian Affairs. That thereafter and prior to April 20th, 1892, the said Indian and his agents and employés, pursuant to said contract and under the supervision of the United States Indian agent having charge of said reservation, did cut, haul and deliver to said defendant a certain amount of the dead and down timber upon said reservation. That said timber amounted to 8,424,820 feet and that said contract provided that said timber should be scaled by the surveyor general for the second lumber district of Minnesota, and that his scale should be conclusive and final between the parties to said contract, and that said timber was scaled prior to said last-named date by said surveyor general, and that said scale so made was the amount above mentioned. Said contract further provided that this defendant should pay to the United States, ten (10) per cent. of the said purchase price of said timber as the stumpage for the same, that on or about April 20th, 1892, this defendant paid to the said Indian agent on account of the said stumpage and the remaining balance of the said purchase price, the sum of $37,911.69, and that said amount was the full and correct amount due for the said quantity of timber according to the price fixed by said contract, and the said Indian agent having supervised the cutting of said timber and having full knowledge of all the circumstances of said cutting and of the acts of the parties in regard thereto and of the nature and quantity of said timber, did accept and receipt for said money for full settlement of said contract and of the payment of the United States for stumpage, and thereupon the said agent ordered and directed said surveyor general to transfer to this defendant the said log marks on said timber and thereupon and on April the 21st 1892, the said surveyor general, in pursuance of said order, did duly

transfer said log marks to this defendant, and the same then were duly recorded in the office of the surveyor general in the name of this defendant. That said money so received from this defendant was by said agent duly accounted for to the United States and the portion due said United States was received and accepted by it and the action of all parties in regard to said contract in the said cutting of said timber were duly approved by the duly authorized executive officers of said Government. That said timber was so cut by said Indian and so delivered to and accepted by this defend-
18 ant in good faith and in the honest belief that said timber was lawfully cut under said contract and that this defendant was entitled to and became the owner of the same upon its delivery to it, the making of said payments and the transfer of said log marks.

Defendant alleges that the matters hereinbefore set forth are the same matters attempted to be set forth in the first, second and third causes of action in said complaint contained, and except as herein qualified or admitted, defendant denies each and every allegation contained in said 1st, 2d and 3d causes of action.

Defendant admits that after the delivery of said logs they did drive and boom said logs to said city of Minneapolis, but defendant alleges that the said driving and booming were done under the circumstances and in the manner hereinafter set forth. Defendant specifically denies that it ever received any greater amount of the said logs described in said cause of action than the amount hereinbefore admitted, and denies that any of said logs were cut, hauled or delivered to it under any other circumstances than those hereinbefore set forth, and denies that the stumpage value of said timber was any greater than the sum of $3,791.16, and denies that the value of the said logs when delivered to this defendant or at any time before the driving of the same commenced was any greater than the sum of $37,911.69, and denies that the lumber manufactured out of said logs was of any greater or larger amount than 9,397,887 feet or of any greater value than $79,882.04.

Answering the fifth cause of action set out in said complaint, this defendant alleges that on or about the month of October, A. D. 1891, pursuant to an act of Congress of the United States entitled "An act in relation to dead and fallen timber on Indian lands," approved February 16th, 1889, and being chapter 172, volume 25, of the Statutes at Large of the United States, this defendant entered into a contract with one Charles Losh, an Indian then belonging to and residing on the Indian reservation mentioned and described in said cause of action, whereby said Indian agreed to cut, haul and deliver during the season of 1891-'92, on certain waters of the Mississippi river, a certain quantity of pine saw-logs, to be cut on said Indian reservation from dead and down timber, and to deliver said logs so cut to this defendant and this defendant agreed to pay for the lumber, which should be cut and scaled under said contract, the sum of four and $\frac{25}{100}$ dollars ($4.25) per thousand feet for part thereof and four and $\frac{50}{100}$ dollars ($4.50) per thousand feet for the remainder. That prior to the making of said contract the

President of the United States pursuant to the said act above recited, had prescribed certain regulations to govern the
19 logging by Indians residing on said reservation. That said contract was in due form of law and contained all the provisions required by said act, and said regulations, and was duly executed by this defendant and the said Indian, and on or about November 27, 1891, was duly approved by the President of the United States, the Secretary of the Interior and the Commissioner of Indian Affairs. That thereafter and prior to April 20th, 1892, the said Indian, his agents and employés, pursuant to said contract and under the supervision of the United States Indian agent having charge of said reservation, did cut, haul and deliver to this defendant a certain amount of the dead and down timber upon said reservation. That the amount of said timber so delivered for which four and $\frac{25}{100}$ dollars ($4.25) per thousand feet was to be paid was 1,132,970 feet, and the amount for which four and $\frac{50}{100}$ dollars ($4.50) per thousand feet was to be paid was 2,077,010 feet. That said contract provided that said timber should be scaled by the surveyor general for the second lumber district of Minnesota, and that his scale should be conclusive and final between the parties to said contract, and that said timber was scaled prior to said last-named date by said surveyor general and that said scale so made was the amounts above mentioned. Said contract further provided that this defendant should pay to the United States ten (10) per cent. of the said purchase price of said timber as the stumpage for the same, that on or about April 20th, 1892, this defendant paid to the said Indian agent on account of said stumpage and the remaining balance of said purchase price, the sum of $14,166.66 and that said amount was the full and correct amount due for said quantity of timber according to the prices fixed in said contract, and the said Indian agent having supervised the cutting of said timber and having full knowledge of all the circumstances of said cutting and of the acts of the parties in regard thereto and of the nature and quantity of said timber, did accept and receipt for said money in full settlement of said contract and of the claims of the United States for stumpage, and thereupon said agent ordered and directed the said surveyor general to transfer to this defendant the said log marks on said timber and thereupon and on April 21st, 1892, the said surveyor general, in pursuance of said order, did duly transfer said log marks to this defendant, and the same then were duly recorded in the office of the said surveyor general in the name of this defendant. That said money so received from this defendant was by said agent duly accounted for to the United States and the portion due said United States was received and accepted by it, and the action of all parties in regard to said contract and the
20 said cutting of said timber was duly approved by the duly authorized executive officer of said Government. That said timber was so cut by said Indian and so delivered to and accepted by this defendant in good faith and in the honest belief that said timber was lawfully cut under said contract and that this defendant was entitled to and became the owner of the same upon its delivery to it, the making of said payments and the transfer of said log

marks. Defendant alleges that the matters hereinbefore set forth are the same matters attempted to be set forth in the fifth cause of action in the said complaint contained, and except as herein qualified or admitted, defendant denies each and every allegation contained in said 5th cause of action.

Defendant admits that after the delivery of said logs it did drive and boom said logs to the said city of Minneapolis, but the defendant alleges that the said driving and booming were under the circumstances and in the manner hereinafter set forth. Defendant specifically denies that it ever received any greater amount of the said logs described in said cause of action than the amount hereinbefore admitted, and denies that any of the said logs were cut, hauled or delivered to it under any other circumstances than those hereinbefore set forth, and denies that the stumpage value of said timber was any greater than the sum of $1,416.66, and denies that the value of said logs then delivered to this defendant, or at any time before the driving of the same commenced, was any greater than the sum of $14,166.66, and denies that the lumber manufactured out of said logs was of any greater or larger amount than 3,580,733 feet, or of any greater value than $30,436.23.

Answering the 6th cause of action set out in said complaint, this defendant alleges than in or about the month of October, 1891, pursuant to an act of the Congress of the United States entitled "An act in relation to dead and fallen timber on Indian lands," approved February 16, 1889, and being chapter 172, volume 25 of the Statutes at Large of the United States, this defendant entered into a contract with one John Tuttle, an Indian then belonging to and residing on the Indian reservation mentioned and described in said cause of action, whereby said Indian agreed to cut, haul, and deliver during the season of 1891–'92 on certain waters of the Mississippi river a certain quantity of pine saw-longs to be cut on said Indian reservation from dead and down timber, and to deliver said logs when so cut to this defendant, and this defendant agreed to pay for the timber which should be cut and scaled under said contract the sum of four dollars ($4.00) per thousand feet. That prior to the making of said contract the President of the United States, pursuant to said act above recited, had prescribed certain regulations to govern the logging by
21 Indians residing on said reservation, that said contract was in due form of law and contained all the provisions required by said act, and said regulations, and was duly executed by this defendant and the said Indian, and on or about November 27th, 1891, was duly approved by the President of the United States, the Secretary of the Interior and the Commissioner of Indian Affairs, that thereafter and prior to April 20th, 1892, the said Indian, his agents and employés, pursuant to said contract and under the supervision of the United States Indian agent having charge of said reservation, did cut, haul and deliver to this defendant a certain amount of the dead and down timber upon said reservation. That said timber amounted to 1,828,600 feet, and that said contract provided that said timber should be scaled by the surveyor general for

the second lumber district of Minnesota, and that his scale should be conclusive and final between the parties to said contract, and that said timber was scaled prior to said last-named date by said surveyor general and that said scale so made was the amount above mentioned. Said contract further provides that this defendant should pay to the United States ten (10) per cent. of the said purchase price of the said timber as a stumpage for the same. That on or about April 20th, 1892, this defendant paid to the said Indian agent on account of the said stumpage and the remaining balance of said purchase price, the sum of $7,314.40, and that said amount was the full and correct amount due for said quantity of timber according to the prices fixed in said contract and the said Indian agent having supervised the cutting of said timber and having full knowledge of all the circumstances of the said cutting and of the acts of the parties in regard thereto and of the nature and quantity of said timber, did accept and receipt for said money in full settlement of said contract and of the claims of the United States for stumpage, and thereupon said agent ordered and directed the said surveyor general to transfer to this defendant the said log marks on said timber and thereupon and on April 21st, 1892, the said surveyor general, in pursuance of said order, did duly transfer said log marks to this defendant and the same then were duly recorded in the office of the said surveyor general in the name of this defendant. That said money so received from this defendant was by said agent duly accounted for to the United States and the portion due said United States was received and accepted by it and the action of all parties in regard to said contract and the said cutting of said timber was duly approved by the duly authorized executive officer of said Government. That said timber was so cut by said Indian and so delivered to and accepted by this defendant in
22 good faith and in the honest belief that said timber was lawfully cut under said contract and that this defendant was entitled to and became the owner of the same upon its delivery to it, the making of said payments and the transfer of said log marks.

Defendant alleges that the matters hereinbefore set forth are the same matters attempted to be set forth in the 6th cause of action in said complaint contained, and except as herein qualified or admitted, defendant denies each and every allegation contained in said 6th cause of action.

Defendant admits that after the delivery of said logs it did drive and boom said logs to the said city of Minneapolis, but defendant alleges that the said driving and booming were done under the circumstances and in the manner hereinafter set forth. Defendant specifically denies that it ever received any greater amount of the said logs described in said cause of action than the amount hereinbefore admitted, and denies that any of said logs were cut, hauled or delivered to it under any other circumstances than those hereinbefore set forth, and denies that the stumpage value of said timber was any greater than the sum of $731.44, and denies that the value of said logs when delivered to this defendant, or at any time before the driving of the same commenced, was any greater than the sum

of $7,314.40, and denies that the lumber manufactured out of said logs was any greater or larger amount than 2,039,803 feet or of any greater value than $17,338.32.

Answering the 4th, 7th and 8th causes of action set out in said complaint, this defendant denies each and every allegation in each of said causes of action contained respectively, except that this defendant is informed and believes that during the time specified said defendant J. B. Bassett & Company did enter into certain contracts with certain Indians for certain pine timber which were similar to those hereinbefore set forth and did receive and take possession of and drive to the city of Minneapolis certain amounts of pine logs cut and delivered to them by said Indians under said contracts and under circumstances similar to those hereinbefore set forth.

Defendant denies each and every allegation in the 9th cause of action set up in said complaint.

Further answering the complaint herein, this defendant alleges that on or about May 14, 1892, and after the said logs hereinbefore mentioned had been delivered to it and said log marks transferred as aforesaid and before the driving of the same had been commenced, the plaintiff herein claiming that a portion of said
23 logs so cut by said Indians was green timber, and not dead or down timber, took possession of all of said logs through one J. O. Warriner duly authorized for that purpose. That defendants had been informed and believed that said timber was all dead and down timber and properly cut under said contracts, and objected to and protested against said action of this plaintiff, that the plaintiff undertook to investigate the matter and ascertain the true facts regarding the same, but that pending such investigation said timber, if not immediately driven, was liable to become worm-eaten, sap-rotted and water-logged, and to greatly deteriorate in value, and that this plaintiff had no means or facility for driving the same. That plaintiff had also at or about the same time seized a large quantity of timber which had been cut and delivered to said defendants, J. B. Bassett & Company, as hereinbefore mentioned. That said timber was in the same situation as the timber belonging to this defendant. That this defendant and J. B. Bassett & Company had made arrangements for the driving of said logs and were ready to immediately commence and vigorously prosecute said driving, that thereupon on or about May 27th, 1892, for the sake of preserving said logs and of realizing the then full value of the same for the parties who should be subsequently determined to be the owners thereof, a contract was entered into between this plaintiff on the one part and this defendant and J. B. Bassett and Company on the other, a copy of which is hereto attached, marked Ex. A, and made a part hereof. That thereafter this defendant and J. B. Bassett & Company, relying upon said acts by said plaintiff, drove and caused to be driven, said logs down the Mississippi river to said city of Minneapolis in accordance with the terms of said contract. That the driving of logs in the Mississippi river, from the city of Brainerd, Minnesota, to said city of Minneapolis, was in the exclusive charge and control of a corporation known as the Mississippi and Rum River Boom Company,

and that said corporation had no facilities for storing or holding any considerable quantity of logs when they came to the said city of Minneapolis and under its charter was not required to so store or hold the same, but was only required to turn the same out to the owners thereof and that in order to realize the value of such logs coming to said city it is and then was necessary that the same should be immediately taken charge of by the owners thereof and manufactured into lumber. That thereupon and on or about March 10, 1893, said investigation by said plaintiff being then pending and undetermined, and it being necessary to make some disposition of said logs so delivered to and claimed by this defendant and this defendant being ready and able to make arrangements for the disposition and manufacture of said logs and the said plaintiff having no facilities for that purpose, it was agreed between plaintiff and this defendant, for the purpose of preserving the value of said logs that the plaintiff should surrender the same and its said claim to possession of the same to this defendant and this defendant should have the right to dispose of said logs, and that plaintiff should accept the bond with sureties from this defendant in lieu of said logs, and its claim against this defendant therefor on account of the matters set up in the complaint herein. That thereupon and on or about March 10th, 1893, in pursuance of said agreement, this defendant and certain sureties executed and delivered to plaintiff a certain bond, the penal sum of which was ($75,000) seventy-five thousand dollars, according to the best of defendant's knowledge and recollection; and the conditions whereof were as follows:

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"Whereas the above-named Pine River Logging & Improvement Company, principal, did in the year 1891, enter into divers contracts with sundry Indians of the Chippewa nation, which contracts were duly approved by the Department of the Interior, whereby each of the said several Indians so contracted with were to cut, haul and deliver during the season of 1891–'92 onto certain waters of the Mississippi river a certain quantity of pine saw-logs to be cut on a certain Chippewa Indian reservation in Minnesota from dead and down timber and when so cut to deliver said logs to the above-named principal; and whereas each of said Indians did proceed in pursuance of said contract to cut a certain quantity of pine saw-logs and did deliver them in certain waters of the Mississippi river to the above-named principal, and whereas a controversy afterwards arose between said principal and the United States as to whether the said logs so cut were cut from dead and down timber or as to whether the same were in great part cut from green timber, and whereas in consequence of such a controversy said logs while in the possession of said principal were seized at or about their place of delivery to the said waters by the United States, acting through the officers and employés of the Department of the Interior, and whereas the United States, *and* on May 27th, 1892, entered into a written agreement in duplicate that the said logs so seized shall remain in the possession of the United States, but shall be driven at its expense by the said principal from said point of seizure to within the limits of the Mis-

sissippi & Rum River Boom Company, and whereas the said logs have been so driven by the said principal and whereas the Department of the Interior has not yet completed its investigation into the facts of said case and it is considered important by both parties that the said logs be further driven to the mill and manufactured
25 for the preservation of the property for the interest of all concerned, pending said investigation and a suit to be instituted by the United States if it shall elect to do so to determine the questions at issue between the parties.

"Now, therefore, the condition of this obligation is such that if the said parties of the first part shall well and truly pay or cause to be paid or satisfy or cause to be satisfied, to the United States of America, any judgment that may be rendered against the above-named principal in any form of action or suit which may be brought by the United States against said above-named principal on account of the premises hereinbefore recited, not to exceed the penalty of this bond, then this obligation to be void, otherwise to be of full force and effect."

That thereupon said plaintiff accepted said bond in lieu of said logs and allowed defendant to take possession of them and to make such disposition of the same as to it seemed best.

That thereafter this defendant, relying upon the said acts of said plaintiff, disposed of a part of said logs to C. A. Smith & Company, defendants herein, and the remainder to C. A. Smith Lumber Company, a corporation of the State of Minnesota. That this defendant necessarily expended in said driving of said logs to Minneapolis at least the sum of $22,877.78, and the said amount was the reasonable value of such driving, and that said expenditure and said disposition of said logs were made by this defendant in consequence of the said acts of said plaintiff hereinbefore set forth and in the belief that thereby plaintiff would make no claim to such increase of value given to such timber by this defendant nor would claim that the disposition of said logs was a conversion of the same.

Defendant further alleges that by reason of the matters and things hereinbefore set forth, this plaintiff is estopped in any event from claiming more than the value of said logs when so taken possession of by it as aforesaid and from claiming that said driving of said logs or the said disposition of the same by this defendant was in any manner wrongful or a conversion of the same.

Further answering and for a separate defense herein, this defendant alleges that if this plaintiff has or ever had any claim or cause for action on account of the cutting of the timber specified in the 4th, 7th and 8th causes of action of said complaint, or any of them, such claim or cause for action, was, and is, solely against said J. B. Bassett & Company and not against this defendant, and that
26 said 1st, 2nd, 3rd, 5th and 6th causes of action, if any such cause of action exists, are or were, and each of them is and was, solely against this defendant, and that in said complaint there is a misjoinder of causes of action in that plaintiff has set up and has attempted improperly to unite in said complaint the said causes

of action affecting this defendant solely and the said causes of action which affect solely defendants, J. B. Bassett & Company.

Wherefore, defendant prays judgment:

1st. That this action be dismissed on account of such misjoinder of cause of action.

2nd. That if said action be not dismissed on account of said misjoinder that plaintiff take nothing by this action against this defendant, and that defendant recover its costs and disbursements.

3d. In case it should be determined upon the trial of this action that plaintiff is entitled to any part of the sum claimed by it in its complaint, that there be set off against the same, the amount so as aforesaid expended by this defendant on account of the purchase price of said timber and the driving of the said (—).

J. B. ATWATER,
Defendant's Attorney.

STATE OF MINNESOTA, }
County of Hennepin, } *ss:*

O. L. Lundberg, of said county, being duly sworn, doth say that he is the president of said Pine River Logging & Improvement Company, that he has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge, except — to matters therein stated on information and belief, and as to those matters that he believes it to be true.

OLE L. LUNDBERG.

Subscribed and sworn to before me, this 15th day of August, 1895.

[NOTARIAL SEAL.] ANGUS G. BRADEN,
Notary Public, Hennepin County, Minnesota.

"EXHIBIT A."

This agreement made and entered into this 27th day of May, A. D. 1892, by and between the Government of the United States, represented by Thomas H. Carter, Commissioner of the General Land Office, party of the first part, and the Pine River Logging & Improvement Company, a corporation duly organized, existing and doing business under the laws of the State of Minnesota,
27 by C. A. Smith, its secretary, and J. B. Bassett & Co., a copartnership consisting of J. B. Bassett and W. L. Bassett, by W. L. Bassett, a member of said firm, parties of the second part,

Witnesseth: That whereas the United States by and through a special agent of the General Land Office has seized and is now in the undisputed possession of certain pine saw-logs heretofore cut on the Winnebigoshish and Leech Lake Indian reservations, in the State of Minnesota, said logs being now in the waters of the Winnebigoshish lake, Leech lake, Leech river, Mississippi river and Ball Club lake, State of Minnesota and within the limits of the Indian reservations aforesaid.

And whereas it is apprehended by both parties that said logs will suffer deterioration in quality by being suffered to remain where they now are until the season of 1893.

And whereas the parties of the second part desire for the preservation of whatsoever property interest they may have in said logs to remove or cause the same to be removed to a boom in the Mississippi river near the city of Minneapolis and are willing to so remove said logs without questioning or attempting to disturb the possession thereof in the United States.

Therefore it is mutually agreed and understood that the parties of the second part may without charge or cost to the United States, and under the supervision of the special agent of the General Land Office cause said logs to be driven from their present position, through the waters of the Mississippi river to such boom in the Mississippi river at or near the city of Minneapolis as the Mississippi & Rum River Boom Company may designate.

Provided that said logs shall be separated from all other logs and detained at Minneapolis in the boom to be designated by the boom company aforesaid subject to the order of the Commissioner of the General Land Office.

In consideration of the covenant and agreement aforesaid and with the distinct understanding that the possession of the United States shall in no sense be questioned or impaired on account of the location of the logs, the United States does hereby agree through the Commissioner of the General Land Office that said logs may be driven in the manner and subject to the conditions hereinbefore stated.

Provided that nothing in this contract contained shall be held in any proceeding, legal or otherwise, hereinafter to be had, to impair any right, title, property or interest that the said parties of
28 the second part or either of them or the United States may have in or to the said logs or any of them. The object of this contract being to recognize and continue possession in the United States and to allow said logs to be driven without in any way affecting the question of right, title, property or interest in the logs, and to leave such questions for future determination.

In witness whereof the parties hereunto set their hands and seals this 27th day of May, A. D. 1892.

THOMAS H. CARTER,
Commissioner of the General Land Office.
C. A. SMITH,
Sec'y Pine River Logging — Improvement Co.
W. L. BASSETT,
Representing J. Bassett & Co.

Witness:
J. B. COLLINS.

Indorsed: Filed August 15, 1895. Oscar B. Hillis, clerk. By R. C. Mabey, deputy.

Thereafter and on the same day the following answer of C. A. Smith & J. S. Pillsbury was filed in said cause, to wit:

UNITED STATES OF AMERICA,
District of Minnesota.

In the Circuit Court, Fourth Division.

UNITED STATES OF AMERICA, Plaintiff,
vs.
PINE RIVER LOGGING AND IMPROVEMENT COMPANY, a Corporation; Joel B. Bassett and William L. Bassett, Copartners as J. B. Bassett & Company, and John S. Pillsbury and Charles A. Smith, Copartners as C. A. Smith & Company, Defendants.

Separate Answer of C. A. Smith & Company.

For their separate answer to the complaint herein, defendants, John S. Pillsbury and Charles A. Smith, admit the allegations contained in paragraphs designated 1st and 2nd of the first page of said complaint.

As to the paragraph designated as 3rd on said first page of said complaint, these defendants admit that they were copartners under the firm name and style of C. A. Smith & Company, as alleged in the complaint, up to the 1st day of May, 1893, but these defendants allege that on or about said last-mentioned date said copartnership was dissolved, and these defendants deny that they now are, or ever since said last-mentioned date have been, copartners.

Further answering defendants deny each and every allegation in said complaint contained, except that defendants admit
29 that prior to May 1st, 1893, the said defendant, Pine River Logging and Improvement Company, did dispose of and deliver to these defendants a certain amount of the pine saw-logs described in said complaint, and that these defendants did manufacture the same into lumber and dispose of said lumber in the ordinary course of their business. That the amount of said lumber so manufactured by these defendants did not exceed 15,628 feet and the value of the same was not greater than the sum of $132.84.

That defendants are informed and believe that at said time the said Pine River Logging and Improvement Company owned said logs and could lawfully dispose of them as aforesaid, and these defendants, in receiving and manufacturing said logs, honestly believed that said last-named defendant was such owner and entitled to dispose of said logs. That these defendants necessarily expended in the manufacture of said logs into lumber at least the sum of $55.88 and that said amount was the reasonable value of such manufacture, and that said expenditure was made by these defendants in good faith and in the reasonable and honest belief that they had the right to manufacture said logs into lumber as aforesaid.

Further answering and for a separate defense herein, these defendants allege that if this plaintiff has or ever had any claim or cause of action against these defendants, on account of any of the matters or claims set up in said complaint, such claim or cause of action was and is separate and distinct from any claim or cause of action which

it has or ever had against the other defendants above named, or any of them, on account of the said matters and things set up in said complaint and the same affects solely these defendants and the same is improperly united in one complaint with the said alleged claims or causes of action against the said other defendants above named, which affects solely said other defendants.

Wherefore, these defendants pray judgment:

1st. That this action be dismissed on account of such misjoinder of causes of action.

2nd. That if said action be not dismissed on account of such misjoinder that plaintiff take nothing by this action against these defendants, and that defendants recover their costs and disbursements.

3rd. In case it should be determined upon the trial of this action that plaintiff is entitled to any part of the sum claimed by it in its complaint that there be set off against the same, the amount so as aforesaid expended by these defendants on account of the manufacture of said logs into lumber.

A. UELAND,
Defendants' Attorney.

30 STATE OF MINNESOTA, }
County of Hennepin. }

Charles A. Smith, being duly sworn, says that he is one of the defendants above named; that he has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge except as to matters therein stated upon information and belief, and as to those matters that he believes it to be true.

CHARLES A. SMITH.

Subscribed and sworn to before me this 15th day of August, 1895.

[NOTARIAL SEAL.] ANGUS G. BRADEN,
Notary Public, Hennepin County, Minnesota.

Indorsed: Filed August 15, 1895. Oscar B. Hillis, clerk. By R. C. Mabey, deputy.

And on the same day the following answer of defendants Joel B. Bassett and William Bassett, etc., was filed of record in said cause to wit:

UNITED STATES OF AMERICA, }
District of Minnesota. }

In Circuit Court, Fourth Division.

UNITED STATES OF AMERICA, Plaintiff,
vs.
PINE RIVER LOGGING AND IMPROVEMENT COMPANY, a Corporation; Joel B. Bassett and William L. Bassett, Copartners as J. B. Bassett & Company, and John S. Pillsbury and Charles A. Smith, Copartners as C. A. Smith and Company, Defendants.

Separate Answer of Joel B. Bassett and William L. Bassett.

For their separate answer to the complaint herein, defendants Joel B. Bassett and William L. Bassett admit the allegations contained in the paragraphs designated first and second of the first page of said complaint.

As to the paragraph designated as third on said first page of said complaint, these defendants are informed and believe and therefore allege that the said copartnership of C. A. Smith & Co. was dissolved on or about May 1st, 1893, and defendants deny that said John S. Pillsbury and Charles A. Smith are or ever since said last-named date have been partners.

Answering the fourth cause of action set out in said complaint, these defendants allege that in or about the month of October A. D. 1891, pursuant to an act of the Congress of the United States
31 entitled "An act in relation to dead and fallen timber on Indian lands," approved February 16th, 1889 and being chapter 172 volume 25, of the Statutes at Large of the United States, these defendants entered into a contract with one Scho-cag-e-sic, an Indian then belonging to and residing on the Indian reservation mentioned and described in said cause of action, whereby said Indian agreed to cut, haul and deliver during the season of 1891-'92, on certain waters of the Mississippi river, a certain quantity of pine saw-logs to be cut on said Indian reservation from dead and down timber, and to deliver said logs, when so cut, to these defendants, and these defendants agreed to pay for the timber which should be cut and scaled under said contract, the sum of four ($4.00) dollars per thousand feet. That prior to the making of said contract the President of the United States, pursuant to said act above recited, had prescribed certain regulations to govern the logging by Indians residing on said reservation, and that said contract was in due form of law, and contained all the provisions required by said act, and said regulations, and was duly executed by these defendants and the said Indian, and on or about November 27th, 1891, was duly approved by the President of the United States, the Secretary of the Interior, and the Commissioner of Indian Affairs. That thereafter and prior to April 20th, 1892, the said Indian, his agents and employees pursuant to said contract and under the supervision of the United States Indian agent having charge of said reservation, did cut, haul and

deliver to these defendants a certain amount of the dead and down timber upon said reservation. That said timber amounted to 2,108,570 feet and that said contract provided that said timber should be scaled by the surveyor general for the second lumber district of Minnesota, and that his scale should be conclusive and final between the parties to said contract, and said timber was scaled prior to said last-named date by said surveyor general and that said scale so made was the amount above mentioned. Said contract provided further that these defendants should pay to the United States ten (10) per cent. of the said purchase price of said timber as the stumpage for the same and on or about April 20th, 1892 defendants paid to the said Indian agent on account of said stumpage and the remaining balance of said purchase price, the sum of $8,434.28, and said amount was the full and correct amount due for said quantity of timber according to the price fixed in said contract, and the said Indian agent, having supervised the cutting of said timber and having full knowledge of all the circumstances of said cutting and of the acts of the parties in regard thereto and of the nature and quantity of said timber, did accept and receipt for said money in full settle-
32 ment of said contract and of the claims of the United States for stumpage, and thereupon said agent ordered and directed the said surveyor general to transfer to defendants the said log marks on said timber, and thereupon and on April 21st, 1892 the said surveyor general in pursuance of said order did truly transfer said log marks to defendants, and the same then were and ever since have been duly recorded in the office of said surveyor general in the name of these defendants. That said money so received from said defendants was, by said agent, duly accounted for to the United States and the portion due said United States was received and accepted by it, and the actions of all parties in regard to said contract and the said cutting of said timber were duly approved by the duly authorized executive officers of said Government. That said timber was so cut by said Indian and so delivered to and accepted by these defendants in good faith and in the honest belief that said timber was lawfully cut under said contract and that defendants were entitled to and became the owners of the same upon its delivery to them, upon the making of said payments and the transfer of said log marks.

Defendants allege that the matters hereinbefore set forth are the same matters attempted to be set forth in the fourth cause of action in said complaint contained, and, except as herein qualified or admitted, defendants deny each and every allegation contained in said fourth cause of action.

Defendants admit that after the delivery of said logs they did drive and boom said logs to said city of Minneapolis and did manufacture the same into lumber, but defendants allege that said driving and manufacturing were done under the circumstances and in the manner hereafter set forth. Defendants specifically deny that they ever received any greater amount of the said logs described in said cause of action than the amount hereinbefore admitted, and deny that any of said logs were cut or hauled or delivered to defendants under any other circumstances than those hereinbefore set forth, and

deny that the stumpage value of said timber was any greater than the sum of $843.42, and deny that the value of said logs when delivered to defendants, or at any time before the driving of the same commenced, was any greater than the sum of $8,434.28, and deny that the lumber manufactured out of said logs was of any greater value than $8.50 per thousand feet.

Answering the seventh and eighth causes of action set out in said complaint, these defendants allege that in or about the month of October, A. D. 1891, pursuant to an act of the Congress of the United States entitled "An act in relation to dead and fallen
33 timber on Indian lands," approved February 16th, 1889, and being chapter 172, volume 25, of the Statutes at Large of the United States, these defendants entered into a contract with one Peter Bonga and one William Bonga, Indians then belonging to and residing on the Indian reservation, mentioned and described in said causes of action, whereby said Indians agreed to cut, haul and deliver during the season of 1891–'92 on certain waters of the Mississippi river, a certain quantity of pine saw-logs to be cut on said Indian reservation from dead and down timber, and to deliver said logs when so cut to these defendants, and these defendants agreed to pay for the timber which should be cut and scaled under said contract, the sum of four ($4.00) dollars per thousand feet. That prior to the making of said contract the President of the United States, pursuant to said act above recited, had prescribed certain regulations to govern the logging by Indians residing on said reservation, and that said contract was in due form of law and contained all the provisions required by said act, and said regulations, and was duly executed by these defendants and the said Indians, and on or about November 27th, 1891, was duly approved by the President of the United States, the Secretary of the Interior, and the Commissioner of Indian Affairs. That thereafter and prior to April 20th, 1892, the said Indians and their agents and employees pursuant to said contract and under the supervision of the United States Indian agent having charge of said reservation, did cut, haul and deliver to these defendants a certain amount of the dead and down timber upon said reservation. That said timber amounted to 2,028,290 feet, and that said contract provided that said timber should be scaled by the surveyor general for the second lumber district of Minnesota, and that his scale should be conclusive and final between the parties to said contract, and said timber was scaled prior to said last-named date by said surveyor general and that said scale so made was the amount above mentioned. Said contract further provided that these defendants should pay to the United States ten (10) per cent. of the said purchase price of said timber as the stumpage for the same and on or about April 20th, 1892, these defendants paid to the said Indian agent on account of said stumpage and the remaining balance of said purchase price, the sum of $8,113.16, and said amount was the full and correct amount due for said quantity of timber according to the price fixed in said contract, and the said Indian agent, having supervised the cutting of said timber and having full knowledge of all the circumstances of said cutting and

of the acts of the parties in regard thereto and of the nature
34 and quantity of said timber, did accept and receipt for said money in full settlement of said contract and of the claims of the United States for stumpage, and thereupon said agent ordered and directed the said surveyor general to transfer to defendants the said log marks on said timber, and thereupon and on April 21st, 1892, the said surveyor general did duly transfer said log marks to defendants, and the same then were and ever since have been duly recorded in the office of said surveyor general in the name of these defendants. That said money so received from these defendants was by said agent duly accounted for to the United States, and the portion due said United States was received and accepted by it, and the actions of all parties in regard to said contract and the said cutting of said timber were duly approved by the duly authorized officers of said Government. That said timber was so cut by said Indians and so delivered to and accepted by these defendants in good faith and in the honest belief that said timber was lawfully cut under said contract and that defendants were entitled to and became the owners of the same upon its delivery to them, the making of said payments and the transfer of said log marks.

Defendants allege that the matters hereinbefore set forth are the same matters attempted to be set forth in the seventh and eighth causes of action in said complaint contained, and except as herein qualified or admitted, defendants deny each and every allegation contained in said seventh and eighth causes of action.

Defendants admit that after the delivery of said logs it did drive and boom said logs to said city of Minneapolis and did manufacture the same into lumber, but defendants allege that the said driving and manufacturing were done under the circumstances and in the manner hereinafter set forth.

Defendants specifically deny that they ever received any greater amount of the said logs described in said causes of action than the amount hereinbefore admitted, and deny that any of said logs were cut or hauled or delivered to defendants under any other circumstances than those hereinbefore set forth, and deny that the stumpage value of said timber was any greater than the sum of $811.32, and deny that the value of said logs when delivered to defendants, or at any time before the driving of the same commenced, was any greater than the sum of $8,113.16, and deny that the lumber manufactured out of said logs was of any greater amount than 2,323,406 feet, or of greater value than $19,748.95.

Answering the first, second, third, fifth and sixth causes of action set out in said complaint, these defendants deny each and
35 every allegation in each of said causes of action contained respectively, except that defendants are informed and believe that, during the time specified, said defendant The Pine River Logging and Improvement Company did enter into certain contracts with certain Indians for cutting certain pine timber, which were similar to those hereinbefore set forth, and did receive and take possession of and drive to the city of Minneapolis certain amounts of pine logs cut and delivered to it by said Indians under said con-

tracts and under circumstances similar to those hereinbefore set forth.

Defendants deny each and every allegation in the ninth cause of action set up in said complaint.

Further answering the complaint herein, defendants allege that on or about May 14th, 1892, and after the said logs hereinbefore mentioned had been delivered to them and said log marks transferred as aforesaid, and before the driving of the same had been commenced, the plaintiff herein claiming that a portion of said logs so cut by said Indians was green timber, and not dead or down timber, took possession of all of said logs through one J. O. Wariner duly authorized for that purpose. That defendants had been informed and believed that said timber was all dead and down timber and properly cut under said contracts, and objected to and protested against said action of this plaintiff; that plaintiff undertook to investigate the matter and ascertain the true facts regarding the same, but that, pending such investigation, said timber, if not immediately driven, was liable to become worm-eaten, sap-rotted and waterlogged, and to greatly deteriorate in value, and that this plaintiff had no means or facilities for driving the same.

That plaintiff had also at or about the same time seized a large quantity of timber which had been cut and delivered to said defendant, The Pine River Logging and Improvement Company, as hereinbefore mentioned; that said timber was in the same situation as the timber belonging to these defendants.

That these defendants and the said Pine River Logging and Improvement Company had made arrangements for the driving of said logs and were ready to immediately commence and vigorously prosecute said driving.

That thereupon and on or about May 27th, 1892, for the sake of preserving said logs and of realizing the then full value of the same for the parties who should be subsequently determined to be the owners thereof, a contract was entered into between this plaintiff on the one part and these defendants and the Pine River Log-
36 ging and Improvement Company on the other, a copy of which is hereto attached, marked Exhibit "A," and made a part hereof.

That thereafter these defendants and the Pine River Logging and Improvement Company, relying upon said acts by said plaintiff, drove and caused to be driven said logs down the Mississippi river to the city of Minneapolis, in accordance with the terms of said contract. That the driving of logs in the Mississippi river from the city of Brainerd, Minnesota, to said city of Minneapolis, was in the exclusive charge and control of a corporation known as the Mississippi & Rum River Boom Company, and that said corporation had no facilities for storing and holding any considerable quantity of logs when they came to the said city of Minneapolis, and under its charter was not required to so store or hold the same, but was only required to turn the same out to the owners thereof; and that, in order to realize the value of such logs coming to said city, it is and

was then necessary that the same should be immediately taken charge of by the owners thereof and manufactured into lumber.

That thereupon and on or about March 10th, 1893, said investigation by said plaintiff being then pending and undetermined, and it being necessary to make some disposition of the said logs so delivered and claimed by these defendants, and these defendants having a saw-mill at the said city of Minneapolis, and being ready and able to manufacture the same into lumber and the said plaintiff having no facilities for that purpose, it was agreed between plaintiff and these defendants for the purpose of preserving the value of said logs that plaintiff should surrender the same and its said claim of possession of the same to defendants, and that defendants should manufacture the same into lumber, and that plaintiff should accept a bond with sureties from defendants in lieu of said logs, and its claim against defendants therefor on account of the matters set up in the complaint herein. That thereupon and on or about March 10th, 1893, in pursuance of said agreement, these defendants and the sureties named in said bond executed and delivered to plaintiff a certain bond, a copy of which is hereto attached, marked Exhibit "B" and made a part hereof. That thereupon said plaintiff accepted said bond in lieu of said logs and allowed defendants to take possession of them and make such disposition of the same as to them seemed best.

That thereupon these defendants, relying upon the said acts of said plaintiff, manufactured said logs into lumber and disposed of such lumber in the ordinary course of their business. That these defendants necessarily expended in the said driving of said
37 logs to Minneapolis at least the sum of $7,032.66 and that said amount was the reasonable value of such driving, and that defendants necessarily expended in the manufacturing of said logs into lumber at least the sum of $14,930.94 and that said amount was the reasonable value of such manufacture and that said expenditures were made by these defendants in consequence of the said acts of plaintiff hereinbefore set forth, and in the belief that thereby plaintiff would make no claim to such increase of value given to such timber by these defendants and in reliance thereon.

Defendants further allege that by reason of the matters and things hereinbefore set forth this plaintiff is estopped, in any event, from claiming more than the value of said logs when so taken possession of by it as aforesaid, or from claiming that said driving of said logs or the said manufacture of the same into lumber by these defendants was in any manner wrongful or a conversion of the same.

Further answering and for a separate defense herein defendants allege that, if this plaintiff has or had any claim or cause of action on account of the cutting of the timber specified in the first, second, third, fifth and sixth causes of action in said complaint, or any of them, such claim or cause of action was and is solely against said Pine River Logging and Improvement Company and not against these defendants, and that said fourth, seventh and eighth causes of action, if any such causes of action exist, are and were and each of them is and was solely against these defendants, and that in said

complaint there is a misjoinder of causes of action, in that plaintiff has set up and has attempted improperly to unite in said complaint the said causes of action affecting these defendants solely and the said causes of action which affect solely the defendant, The Pine River Logging and Improvement Company.

Wherefore defendants pray judgment.

1st. That this action be dismissed, on account of such misjoinder of causes of action.

2nd. That, if said action be not dismissed on account of such misjoinder, then plaintiff take nothing by this action against defendants, and that defendants recover their costs and disbursements.

3rd. In case it should be determined upon the trial of this action that plaintiff is entitled to any part of the sum claimed by it in its complaint, that there be set off against the same the amount so as aforesaid expended by these defendants on account of the purchase price of said timber and the driving of the same and the manufacture of the same into lumber.

August 12th, 1895.

EUGENE G. HAY,
Defendants' Attorney.

38 STATE OF MINNESOTA, } ss:
County of Hennepin, }

William L. Bassett of said county being duly sworn deposes and says: That he is one of the defendants in the foregoing action; that he has read the foregoing separate answer and that the same is true to his own knowledge except as to those matters therein stated on information and belief and as to those matters he believes it to be true.

WILLIAM L. BASSETT.

Subscribed and sworn to before me this 15th day of August A. D. 1895.

[NOTARIAL SEAL.] ANGUS G. BRADEN,
Notary Public, Hennepin County, Minnesota.

EXHIBIT "A."

This agreement made and entered into this 27th day of May, A. D. 1892, by and between the Government of the United States represented by Thomas H. Carter, Commissioner of the General Land Office, party of the first part, and The Pine River Logging & Improvement Company, a corporation duly organized, existing and doing business under the laws of the State of Minnesota, by C. A. Smith, its secretary, and J. B. Bassett & Co. a copartnership consisting of J. B. Bassett and W. L. Bassett, by W. L. Bassett, a member of said firm, parties of the second part.

Witnesseth, that whereas the United States by and through a special agent of the General Land Office has seized and is now in the undisputed possession of certain pine saw-logs heretofore cut

on the Winnibigoshish and Leech Lake Indian reservations, in the State of Minnesota, said logs being now in the waters of the Winnibigoshish lake, Leech lake, Leech river, Mississippi river and Ball Club lake, State of Minnesota, and within the limits of the Indian reservations aforesaid.

And whereas it is apprehended by both parties that said logs will suffer material deterioration in quality by being suffered to remain where they now are until the season of 1893.

And whereas the parties of the second part desire for the preservation of whatsoever property interest they may have in said logs to remove or cause the same to be removed to a boom in the Mississippi river near the city of Minneapolis and are willing to so remove said logs without questioning or attempting to disturb the possession thereof in the United States.

Therefore it is mutually agreed and understood that the parties of the second part may without charge or cost to the United
39 States, and under the supervision of a special agent of the General Land Office cause said logs to be driven from their present position, through the waters of the Mississippi river to such boom in the Mississippi river at or near the city of Minneapolis as the Mississippi and Rum River Boom Company may designate.

Provided that said logs shall be separate from all other logs and detained at Minneapolis in the boom to be designated by the boom company aforesaid subject to the order of the Commissioner of the General Land Office.

In consideration of the covenant and agreement aforesaid and with the distinct understanding that the possession of the United States shall in no sense be questioned or impaired on account of change of location of the logs, the United States does hereby agree through the Commissioner of the General Land Office that said logs may be driven in the manner and subject to the conditions hereinbefore stated.

Provided, that nothing in this contract contained shall be held in any proceedings legal or otherwise hereafter to be had to impair any right, title, property or interest that the said parties of the second part or either of them or the United States may have in or to the said logs or any of them. The object of this contract being to recognize and continue possession in the United States and to allow said logs to be driven without in any way affecting the question of right, title, property or interest in the logs and to leave such questions for future determination.

In witness whereof the parties hereunto set their hands and seals this 27th day of May, A. D. 1892.

THOMAS H. CARTER,
Commissioner of the General Land Office.
C. A. SMITH,
Sec'y Pine River Logging & Improvement Co.
W. L. BASSETT,
Representing J. B. Bassett & Co.

Witness:
J. B. COLLINS.

EXHIBIT "B."

Know all men by these presents, that we, Joel B. Bassett and William L. Bassett, partners as J. B. Bassett & Company of the city of Minneapolis, county of Hennepin and State of Minnesota as principals and Daniel Bassett and Thomas Lowry of Minneapolis, Minnesota, as sureties, parties of the first part, are held and firmly bound unto the United States of America, party of the second part, in the penal sum of twenty-six thousand dollars, for the payment of which well and truly to be made, we bind ourselves and our and each of our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 10th day of March, A. D. 1893.

Whereas the above-named J. B. Bassett & Company, principal did in the year 1891, enter into divers contracts with sundry Indians of the Chippewa nation, which contracts were duly approved by the Department of the Interior, whereby each of the said several Indians so contracted with were to cut, haul and deliver during the season of 1891–'92, onto certain waters of the Mississippi river a certain quantity of pine saw-logs to be cut on a certain Chippewa Indian reservation in Minnesota, from dead and down timber, and when so cut to deliver said logs to the above-named principal; and whereas each of said Indians did proceed in pursuance of said contract to cut a quantity of pine saw-logs and did deliver them in said waters of the Mississippi river to the above-named principal, and whereas a controversy afterwards arose between said principal and the United States as to whether the said logs so cut were cut from dead and down timber or as to whether the same were in great part cut from green timber, and whereas in consequence of such a controversy said logs while in the possession of said principal were seized at or about their place of delivery in said waters by the United States acting through the officers and employés of the Department of the Interior, and whereas the United States and on May 27th, 1892, entered into written agreements in duplicate that the said logs so seized shall remain in the possession of the United States, but shall be driven at its expense by the said principals from said point of seizure to and within the limits of the Mississippi & Rum River Boom Company, and whereas the said logs have been so driven by said principal, and whereas the Department of the Interior has not yet completed its investigation into the facts of said case and it is considered important by both parties that the said logs be further driven to the mill and manufactured for the preservation of the property for the interests of all concerned, pending said investigation and a suit to be instituted by the United States if it shall elect to do so to determine the questions at issue between the parties.

Now, therefore, the condition of this obligation is such that if the said parties of the first part shall well and truly pay or cause to be paid or satisfy or cause to be satisfied to the United States of Amer-

ica, any judgment that may be rendered against the above-
41 named principal in any form of action or suit which may be brought by the United States against said above-named principal on account of the premises hereinbefore recited, not exceeding the penalty of this bond, then this obligation to be void, otherwise to be of full force and effect.

(Signed) JOEL B. BASSETT. [SEAL.]
WILLIAM L. BASSETT. [SEAL.]
DANIEL BASSETT. [SEAL.]
THOMAS LOWRY. [SEAL.]

Signed, sealed and delivered in presence of
FRANKLIN C. GERHARD.
ROBERT O. ODELL.

STATE OF MINNESOTA, } ss:
County of Hennepin, }

On this 10th day of March, A. D. 1893, personally came before me Joel B. Bassett and William L. Bassett partners as J. B. Bassett & Company and Daniel Bassett and Thomas Lowry to me known to be the persons described in and who executed the foregoing obligation, and the said Joel B. Bassett and William L. Bassett acknowledged that they executed the foregoing obligation as the free act and deed of said firm, and the said Daniel Bassett and Thomas Lowry of themselves acknowledged that they executed said obligation freely and voluntarily for the uses and purposes therein expressed.

(Signed) R. R. ODELL,
U. S. Commissioner, Dist. of Minnesota.

STATE OF MINNESOTA, } ss:
County of Hennepin, }

Daniel Bassett and Thomas Lowry having been first by me duly sworn says each for himself that he is worth the sum of fifty-two thousand dollars over and above all debts, liabilities and exemptions.

(Signed) DANIEL BASSETT.
THOMAS LOWRY.

Subscribed and sworn to before me this 10th day of March, A. D. 1892.

R. R. ODELL,
U. S. Commissioner, Dist. Minn.

I approve the foregoing bond and sufficiency of the sureties thereon.

M'ch 10th, 1893.

EUGENE G. HAY,
U. S. Attorney. Dist. of Minn.

Indorsed: Filed August 15, 1895. Oscar B. Hillis, clerk. By R. C. Mabey, deputy.

42 Thereafter and on August 26th, the following demurrers were filed of record in said cause, to wit:

UNITED STATES OF AMERICA, }
District of Minnesota. }

In the Circuit Court, Fourth Division.

UNITED STATES OF AMERICA, Plaintiff,
vs.
PINE RIVER LOGGING AND IMPROVEMENT COMPANY, a Corporation; Joel B. Bassett and William L. Bassett, Copartners as J. B. Bassett & Company, and John S. Pillsbury and Charles A. Smith, Copartners as C. A. Smith & Company, Defendants.

Demurrer to Certain Attempted Defenses of Joel B. Bassett and William L. Bassett.

The above-named plaintiff, by John E. Stryker, its attorney, demurs to the attempted defense to the fourth cause of action of the complaint, alleged in the answer (line 25, page 1 to line 10, page 5), and specifies as ground of objection thereto, that upon its face, said alleged defense does not constitute a counter-claim or defense in this that:

First. There is no copy of the instrument in writing (the alleged contract between Scho-cag-e-sic and J. B. Bassett & Company), upon which said pleading is founded, annexed to said answer, and no sufficient reason is stated, by affidavit or otherwise, for the failure to annex said copy.

Second. The terms of said contract as to the amount of timber to be cut are not sufficiently set forth to justify the acts complained of by the plaintiff.

Third. Said alleged defense does not state a release, bar or estoppel.

Plaintiff demurs to the attempted defense to the seventh and eighth causes of action contained in the complaint alleged in the answer (page 5, line 11 to page 8, line 24 inclusive), and specifies as ground of objection thereto that upon its face it does not constitute a counter-claim or defense in this that:

First. There is no copy of the instrument in writing (the alleged contract between William and Peter Bonga and J. B. Bassett & Company) upon which said pleading is founded, annexed to said answer, and no sufficient reason is stated by affidavit or otherwise for the failure to annex said copy.

Second. Neither the terms of said contract, nor the rights granted thereunder, as to the amount of timber to be cut, or
43 the parties permitted to cut and remove the same are sufficiently set forth to make performance thereof, if proven, a justification of the acts complained of by plaintiff, in its seventh and eighth causes of action.

Third. Said alleged defense does not state a release, bar or estoppel.

Plaintiff demurs to the defense to the first, second, third, fifth and sixth causes of action of the complaint alleged in the answer (page 8, line 26 to page 9, line 8 inclusive), and specifies as ground of objection thereto that upon its face said attempted defense does not constitute a counter-claim or defense in this that:

First. There are no copies of the instruments in writing (the alleged contracts between the Pine River Logging & Improvement Company and certain Indians) upon which said defense is founded, annexed to said answer, and no sufficient reason is stated, by affidavit or otherwise, for the failure to annex said copies.

Second. Said defense does not set forth the terms or conditions of said contract, a performance of which, it is alleged, justifies the acts complained of by plaintiff.

Plaintiff demurs to the defense set forth on page 9, line 11, to page 12, line 22 inclusive, of the answer, and specifies as ground of objection thereto that upon its face said attempted defense does not constitute a counter-claim or defense in this that:

First. Neither the seizure nor agreements, nor bond therein set forth, nor any or either of them, operate as a bar or estoppel, or by way of reduction of damages against this plaintiff.

Second. The officers and agents of this plaintiff alleged to have made said agreements, were not authorized and had no power to so estop, bar or reduce the measure of damages against this plaintiff.

JOHN E. STRYKER,
Plaintiff's Attorney.

Indorsed: Demurrer to certain attempted defenses of Joel B. Bassett and William L. Bassett. Filed August 26th, 1895. Oscar B. Hillis, clerk. By Robert C. Mabey, deputy.

44 UNITED STATES OF AMERICA, }
District of Minnesota. }

In the Circuit Court, Fourth Division.

UNITED STATES OF AMERICA, Plaintiff,
vs.
PINE RIVER LOGGING AND IMPROVEMENT COMPANY, a Corporation; Joel B. Bassett and William L. Bassett, Copartners as J. B. Bassett & Company, and John S. Pillsbury and Charles S. Pillsbury, Copartners as C. A. Smith & Company, Defendants.

Demurrer to Certain Attempted Defenses of the Pine River Logging and Improvement Company.

The above-named plaintiff, by John E. Stryker, its attorney, demurs to the attempted defense to the first, second and third causes of action of the complaint, alleged in the answer (folios 3 to 12 inclusive), and specifies as ground of objection thereto, that upon its face said alleged defense does not constitute a counter-claim or defense in this that:

First. There is no copy of the instrument in writing (the alleged contract between William Fairbanks and the Pine River Logging and Improvement Company) upon which said pleading is founded, annexed to said answer, and no sufficient reason is stated, by affidavit or otherwise, for the failure to annex said copy.

Second. Neither the terms of said contract, nor the rights granted thereunder, as to the amount of timber to be cut, or the parties permitted to cut and remove the same are sufficiently set forth to make performance thereof, if proven, a justification of the acts complained of by plaintiff, in its first, second or third causes of action.

Third. Said alleged defense does not state a release, bar or estoppel.

Plaintiff demurs to the attempted defense to the fifth cause of action contained in the complaint, alleged in the answer (folios 12 to 21 inclusive), and specifies as ground of objection thereto that upon its face it does not constitute a counter-claim or defense in this that:

First. There is no copy of the instrument in writing (the alleged contract between Charles Losh and the Pine River Logging and Improvement Company (upon which said pleading is founded), annexed to said answer, and no sufficient reason is stated, by affidavit or otherwise, for the failure to annex said copy.

45 Second. The terms of said contract as to the amount of timber to be cut are not sufficiently set forth to justify the acts complained of by plaintiff.

Third. Said alleged defense does not state a release, bar or estoppel.

Plaintiff demurs to the defense to the sixth cause of action in the complaint, alleged in the answer (folios 22 to 31 inclusive), and specifies as ground of objection thereto that upon its face it does not constitute a counter-claim or defense in that:

First. There is no copy of the instrument in writing (the alleged contract between John Tuttle and the Pine River Logging and Improvement Company) upon which said pleading is founded, annexed to said answer, and no sufficient reason is stated, by affidavit or otherwise, for the failure to annex said copy.

Second. The terms of said contract as to the amount of timber to be cut are not sufficiently set forth to justify the acts complained of by plaintiff.

Third. Said alleged defense does not state a release, bar or estoppel.

Plaintiff demurs to the defense to the fourth, seventh and eighth causes of action of the complaint alleged in the answer (folios 31 to 32 inclusive), and specifies as ground of objection thereto that upon its face said attempted defense does not constitute a counter-claim or defense in this that:

First. There are no copies of the instruments in writing (the alleged contracts between J. B. Bassett & Company and certain Indians) upon which said defense is founded, annexed to said answer, and no sufficient reason is stated, by affidavit or otherwise for the

Second. Said defense does not set forth the terms or conditions of said contract, a performance of which, it is alleged justifies the acts complained of by plaintiff.

Plaintiff demurs to the defense set forth in folios 32 to 46 inclusive of the answer, and specifies as ground of objection thereto that upon its face said attempted defense does not constitute a counterclaim or defense in this that:

First. Neither the seizure nor agreements, nor bond therein set forth, nor any or either of them, operate as a bar or estoppel, or by way of reduction of damages against this plaintiff.

46 Second. The officers and agents of this plaintiff alleged to have made said agreements, were not authorized and had no power to estop, bar or reduce the measure of damages against this plaintiff.

JOHN E. STRYKER,
Plaintiff's Attorney.

Indorsed: Demurrer to certain attempted defenses of the Pine River Logging and Improvement Co. Filed August 26th, 1895. Oscar B. Hillis, clerk. By Robert C. Mabey, deputy.

UNITED STATES OF AMERICA, }
District of Minnesota. }

In the Circuit Court, Fourth Division.

UNITED STATES OF AMERICA, Plaintiff,
vs.
PINE RIVER LOGGING AND IMPROVEMENT COMPANY, a Corporation; Joel B. Bassett and William L. Bassett, Copartners as J. B. Bassett & Company, and John S. Pillsbury and Charles A. Smith, Copartners as C. A. Smith & Company, Defendants.

Plaintiff replying to the separate defense of Joel B. Bassett and William L. Bassett, commencing with the twenty-fourth line of the 12th page of their separate answer, and ending with the eighth line of the 13th page thereof, denies each and every allegation, matter and thing therein set forth, except as alleged in the complaint herein.

JOHN E. STRYKER,
Plaintiff's Attorney.

STATE OF MINNESOTA, }
County of Ramsey, } *ss:*

John E. Stryker came before me personally, and having been duly sworn, doth depose and say: That he is a special assistant United States attorney, duly appointed and qualified to prosecute the above-entitled action; that he has read the foregoing reply, and knows the contents thereof, and that the same is true, except as to matters therein stated upon his information and belief, and as to such matters he believes them to be true.

JOHN E. STRYKER.

Subscribed and sworn to before me this 26th day of August, A. D. 1895.

[NOTARIAL SEAL.] HENRY JOHNS,
Notary Public, Ramsey County, Minnesota.

Indorsed: Reply to the separate defense of Joel B. Bassett and William L. Bassett. Filed August 26, 1895. Oscar B. Hillis, clerk. By Robert C. Mabey, deputy.

And on the same day the following replies were filed of record in said cause, to wit:

47 UNITED STATES OF AMERICA, }
District of Minnesota. }

In the Circuit Court, Fourth Division.

UNITED STATES OF AMERICA, Plaintiff,
vs.
PINE RIVER LOGGING AND IMPROVEMENT COMPANY, a Corporation; Joel B. Bassett and William L. Bassett, Copartners as J. B. Bassett & Company, and John S. Pillsbury and Charles A. Smith, Copartners as C. A. Smith & Company, Defendants.

Replying to the separate answer of the defendants, John A. Pillsbury and Charles A. Smith, plaintiff denies each and every allegation, matter and thing therein set forth, except as alleged in the complaint herein.

JOHN E. STRYKER,
Plaintiff's Attorney.

STATE OF MINNESOTA, }
County of Ramsey, } *ss:*

John E. Stryker came before me personally and having been duly sworn doth depose and say: That he is a special assistant United States attorney duly appointed and qualified to prosecute the above-entitled action, that he has read the foregoing reply and knows the contents thereof, and that the same is true except as to the matters therein stated upon his information and belief, and as to such matters he believes them to be true.

JOHN E. STRYKER.

Subscribed and sworn to before me this 26th day of August, A. D. 1895.

[NOTARIAL SEAL.] HENRY JOHNS,
Notary Public, Ramsey County, Minnesota.

Indorsed: Filed August 26th, 1895. Oscar B. Hillis, clerk. By R. C. Mabey, deputy.

UNITED STATES OF AMERICA, }
District of Minnesota. }

In the Circuit Court, Fourth Division.

UNITED STATES OF AMERICA, Plaintiff,
vs.
PINE RIVER LOGGING AND IMPROVEMENT COMPANY, a Corporation; Joel B. Bassett and William L. Bassett, Copartners as J. B. Bassett & Company, and John S. Pillsbury and Charles A. Smith, Copartners as C. A. Smith & Company, Defendants.

Plaintiff replying to the separate defense of the Pine River Logging and Improvement Company, commencing with the
48 fourth line of the 46th folio of its answer, and ending with the ninth line of the 47th folio thereof, denies each and every allegation, matter and thing therein set forth, except as alleged in the complaint herein.

JOHN E. STRYKER,
Plaintiff's Attorney.

STATE OF MINNESOTA, }
County of Ramsey, } *ss:*

John E. Stryker came before me personally, and having been duly sworn, doth depose and say: That he is a special assistant United States attorney, duly appointed and qualified to prosecute the above-entitled action; that he has read the foregoing reply, and knows the contents thereof, and that the same is true, except as to matters therein stated upon his information and belief and as to such matters he believes them to be true.

JOHN E. STRYKER.

Subscribed and sworn to before me this 26th day of August A. D. 1895.

[NOTARIAL SEAL.]

HENRY JOHNS,
Notary Public, Ramsey County, Minnesota.

Indorsed: Reply to separate defense of the Pine River Logging and Improvement Company. Filed August 26th, 1895. Oscar B. Hillis, clerk. By Robert C. Mabey, deputy.

That thereafter and on October 2nd, 1895 the following replies were filed of record in said cause, in words and figures following, to wit:

UNITED STATES OF AMERICA,
District of Minnesota.

In the Circuit Court, Fourth Division.

UNITED STATES OF AMERICA, Plaintiff,
vs.
PINE RIVER LOGGING AND IMPROVEMENT COMPANY, a Corporation; Joel B. Bassett and William L. Bassett, Copartners as J. B. Bassett & Company, and John S. Pillsbury and Charles A. Smith, Copartners as C. A. Smith & Company, Defendants.

Replying to the separate answer of the defendants Joel B. Bassett and William L. Bassett, plaintiff

Admits that pursuant to an act of Congress, entitled "An act in relation to dead and fallen timber on Indian lands," approved February 16th, 1889, said defendants entered into a contract with one Scho-cag-e-sig, an Indian, and that said contract was approved, as in the answer stated. Plaintiff alleges that a true copy of said
49 contract is hereunto attached, marked Exhibit "A," and made a part hereof, and that said contract is the same contract attempted to be set out by defendants in answer to the fourth cause of action contained in the complaint.

Plaintiff further admits that the President of the United States had, prior to the making of said contract, prescribed regulations to govern the logging by Indians residing on the reservations named in the complaint, and alleges that his approval of said contract was subject to the regulations so prescribed.

Plaintiff denies that the logs described in its fourth cause of action, or any of them, were cut pursuant to said contract, or in accordance with the said act of Congress, or with the regulations prescribed by the President of the United States, as aforesaid.

Plaintiff alleges that of the logs claimed by defendants to have been cut pursuant to said contract, one million six hundred and sixty-four thousand two hundred and forty-eight (1,664,248) feet were cut from pine trees which were alive and standing at the time of said cutting.

Plaintiff further admits that prior to April 20th, 1892, the logs, described by defendants in their answer to said fourth cause of action, were scaled by a deputy surveyor general for the second lumber district of Minnesota, and that on or about said date, said defendants paid to the Indian agent of the United States, named in said answer, the sum of forty-five (45) cents per thousand feet as stumpage for the logs so scaled, and admits that said surveyor general did, on or about said date, transfer the log marks, referred to by defendants, to them.

Further answering, plaintiff admits that pursuant to the act of Congress, above referred to, said defendants entered into a contract with Peter Bonga and William Bonga, Indians, and that said contract was approved as stated in the answer. Plaintiff alleges that a true copy of said contract is hereunto attached, marked Exhibit

"B," and hereby made a part hereof, and that said contract is the same contract attempted to be set out by defendants in answer to the seventh and eighth causes of action contained in the complaint.

Plaintiff further admits that the President of the United States had prior to the making of said contract, prescribed regulations to govern the logging of Indians, as hereinbefore stated, and alleges that his approval of said contract was subject to the regulations so prescribed.

50 Plaintiff denies that the logs, or any of them, described in its seventh and eighth causes of action, or either of such causes of action, were cut pursuant to said contract, or in accordance with the said act of Congress, or with the regulations prescribed by the President of the United States, as aforesaid.

Plaintiff alleges that of the logs claimed by defendant to have been cut pursuant to said contract, one million seven hundred and forty-two thousand three hundred and six (1,742,306) feet were cut from pine trees which were alive and standing at the time of said cutting.

Plaintiff further admits that prior to April 20th, 1892, the logs described by defendants in their answer to said seventh and eighth causes of action were scaled by a deputy surveyor general for the second lumber district of Minnesota, and that on or about said date, said defendants paid to the Indian agent of the United States, named in said answer, the sum of forty (40) cents per thousand feet as stumpage for the logs so scaled, and admits that said surveyor general did, on or about said date mentioned in said answer, transfer the log marks referred to by the defendants to them.

Replying to the answer of said defendants to the first, second, third, fifth and sixth causes of action, plaintiff admits that contracts similar in form to those hereunto attached, as Exhibits "A" and "B," were made by the Pine River Logging and Improvement Company with certain Indians, but denies that the logs described in its first, second, third, fifth and sixth causes of action, or any of said logs, were cut pursuant to said contracts, or in accordance with said act of Congress, or with the regulations prescribed by the President of the United States, as aforesaid.

Plaintiff admits that all of the logs described in its complaint herein were taken possession of on or about May 14th, 1892, by J. O. Warriner, a special agent of the General Land Office of the United States, and that thereafter on or about May 27th, 1892, said logs were redelivered to defendants.

Plaintiff further admits that an instrument substantially in the form set forth by the defendants in their Exhibit "A" was made by and between Thomas H. Carter, then Commissioner of the General Land Office of the United States, and the defendants named in said contract, and admits that a bond substantially in the form set forth in their Exhibit "B" was executed by the parties whose names are thereto attached, and delivered to the Commissioner of the General Land Office of the United States.

51 Except as alleged in the complaint or herein expressly admitted or qualified, plaintiff denies each and every allegation,

matter and thing in each and every part of the separate answer of the defendants contained.

Wherefore, plaintiff asks judgment, as prayed for in the complaint.

JOHN E. STRYKER,
Plaintiff's Attorney.

STATE OF MINNESOTA, } ss:
County of Ramsey, }

John E. Stryker came before me personally, and having been duly sworn, doth depose and say: That he is a special assistant United States attorney for said district, duly appointed and qualified to prosecute the above-entitled action; that he has read the foregoing reply, and knows the contents thereof, and that the same is true, except as to matters therein stated upon his information and belief, and as to such matters he believes them to be true.

JOHN E. STRYKER.

Subscribed and sworn to before me this 2nd day of October, A. D. 1895.

[NOTARIAL SEAL.] A. R. MOORE,
Notary Public, Ramsey County, Minnesota.

EXHIBIT "A."

In and for the consideration below named, Schaggeeshig, Indian, party of the first part, hereby enters into an agreement with J. B. Bassett & Co., as parties of the second part, to cut, haul and deliver during the season of 1891 and 1892, on, or tributary to the Mississippi river, two hundred fifty thousand feet more or less of pine sawlogs, to be cut on the Indian reservation, from dead and down timber, under the supervision of the United States Indian agent, or his deputies.

Said logs to be well cut and well marked with the following bark mark  , and the following stamp mark  Said party of the first part further agrees to cut, haul and place around said logs a sufficient amount of timber, suitable for boom sticks, for the booming of the said logs into rafts of convenient size for driving across the flowage of the Government dam.

Said party of the first part further agrees to hold the second party harmless from any and all claims for labor or otherwise which are or may be lienable claims and attached upon the said logs, and that all labors must be paid in full.

Said party of the first part further agrees that second parties will pay the United States Indian Department or its authorized
52 agents the sum stipulated by said department to be paid to it as stumpage for said timber, which amount, being ten per cent. of purchase price, shall be deducted from the price per thousand feet below named.

As a consideration for this agreement, and for the above-named services the said J. B. Bassett & Co. hereby agrees to pay the said

first party the uniform price of four dollars per thousand feet, board measure, for said logs (and one-half scalage, so cut, marked, hauled and landed in accordance with the following terms: After fifty thousand feet of logs have been cut, marked and scaled, then the said second parties will pay the said first party the sum of one hundred dollars (*i. e.*, two $2.00) per thousand feet, to enable them to purchase supplies and pay the necessary expenses. As soon as another fifty thousand (50,000) feet shall have been cut, marked, hauled and scaled, the said second parties will pay the said first party a further sum of one hundred dollars (*i. e.*, two dollars per thousand feet). When one hundred thousand feet shall have been cut, marked, hauled and scaled, the second parties agree to pay from time to time, such further amounts as may be desired by the agent, as will make with advanced payments already made, the sum of $2.00 per thousand feet for any and all logs delivered on above landings as fast as scaled, and the further sum of one dollar per thousand feet at the end of the logging season on all logs that show by scale to have been cut, marked and hauled, and the balance sixty days thereafter.

It is mutually stipulated and agreed by and between the parties hereto that the scale of the surveyor general for the scaling of logs and lumber in the second district Minnesota, or his deputies, shall be conclusive and final between said parties.

It is mutually understood and agreed by the parties to this contract that the logging operation shall be under the supervision of the United States Indian agent for the White Earth Indian agency, of Minnesota, and that all payments mentioned herein shall also be under his supervision. The fulfillment of all agreements under this contract shall be in conformity with the regulations prescribed by the President of the United States, dated October 17th, 1890, to govern the logging by the Indians, in the Indian reservation of White Eearth agency, of Minnesota.

his
SHOCAGGEESHIG. x
mark.
J. B. BASSETT & CO.,
By WILLIAM L. BASSETT.

In presence of—
A. R. ROGERS.
HENRY A. McALISTER.

53 STATE OF MINNESOTA, }
County of Itasca, } *ss:*

On the 29th day of October, A. D. 1891, before me a notary public, in and for State of Minnesota, personally appeared Shocaggeeshig, by me known to be the party who executed the foregoing and within instrument and acknowledged that he executed the same as his free act and deed.

[SEAL.]

A. R. ROGERS,
Notary Public, Minnesota.

STATE OF MINNESOTA, } ss:
County of Hennepin, }

On this 3rd day of November, A. D. 1891, before me a notary public within the said Hennepin county, State of Minnesota, personally appeared William L. Bassett, known to be a partner in the firm of J. B. Bassett & Co. with full power to execute contracts, and who executed the foregoing and within instrument and acknowledged that he executed the same freely and voluntarily for said J. B. Bassett & Co., of which firm he is a partner.

[SEAL.] A. R. ROGERS,
Notary Public, Hennepin Co., Minnesota.

STATE OF MINNESOTA, } ss:
County of Itasca, }

On this 29th day of October, A. D. 1891, before me personally appeared Shocaggeeshig, who being duly sworn, deposes and says, that he is of Indian descent, and that he has been, and that he now is living upon and enjoying the privileges of the Mississippi River Indian reservation, and as such is entitled to the rights and considerations as granted him by the Government of the United States.

his
SHOCAGGEESHIG x
mark.

Witness as to mark:
A. R. ROGERS.

[SEAL.] A. R. ROGERS,
Notary Public, Minn.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS, *November 27th*, 1891.

Agreeably with authority of the President indorsed (November 24th, 1891) on department letter to him, of November 16th, 1891, the within contract is hereby approved.

T. J. MORGAN,
Commissioner.

DEPARTMENT OF THE INTERIOR, *November 27th*, 1891.

Approved.

JOHN W. NOBLE, *Secretary.*

54 EXHIBIT "B."

In and for the considerations below named, William and Peter Bonga, Indians, party of the first part, hereby enters into an agreement with J. B. Bassett & Co., as parties of the second part, to cut, haul and deliver, during the season of 1891 and 1892, on or tributary to the Mississippi river, five hundred thousand feet more or less of pine saw-logs, to be cut on the Indian reservation, from dead and down timber, under the supervision of the United States Indian agent, or his deputies.

Said logs to be well cut and well marked with the following bark mark ___*___ R, and the following stamp mark - - - - - Said party of the first part further agrees to cut, haul and place around said logs a sufficient amount of timber, suitable for boom sticks, for the booming of said logs into rafts of convenient size for driving across the flowage of the Government dam.

Said party of the first part further agrees to hold the second party harmless from any and all claims for labor or otherwise which are or may be lienable claims, and attached upon said logs, and that all labor must be paid in full.

Said party of the first part further agrees that second party will pay the United States Indian Department, or its authorized agents, the sum stipulated by said department to be paid to it as stumpage for said timber, which amount, being ten per cent. of purchase price, shall be deducted from the price per thousand feet below named.

As a consideration for this agreement, and for the above-named services, the said J. B. Bassett & Co. hereby agrees to pay the said first party the uniform price of four dollars per thousand feet, board measure, for said logs (and one-half scalage, so cut, marked, hauled and landed in accordance with the following terms:

After one hundred thousand (100,000) feet of logs have been cut, marked and scaled, then the said second parties will pay the said first parties the sum of two hundred dollars, *i. e.* two dollars ($2.00) per thousand feet, to enable them to purchase supplies and pay the necessary expenses.

As soon as another one hundred thousand (100,000) feet shall have been cut, marked, hauled and scaled, the said second parties will pay the said first parties a further sum of two hundred dollars (two dollars per thousand feet). When two hundred thousand feet shall have been cut, marked, hauled, and scaled, the said second parties agree to pay from time to time, such further amounts as may be desired by the agent, as will make, with advanced pay-
55 ments already made, the sum of $2.00 per thousand feet, for any and all logs delivered on above landings as fast as scaled, and the further sum of one dollar per thousand feet at the end of the logging season on all logs that show by scale to have been cut, marked and hauled, and the balance sixty days thereafter.

It is mutually stipulated and agreed by and between the parties hereto that the scale of the surveyor general for the scaling of logs and lumber in the second district Minnesota, or his deputies, shall be conclusive and final between said parties.

It is mutually understood and agreed by the parties to this contract that the logging operation shall be under the supervision of the United States Indian agent, for the White Earth Indian agency, of Minnesota, and that all payments mentioned herein shall also be under his supervision. The fulfillment of all agreements under this contract shall be in conformity with the regulations prescribed by the President of the United States, dated Oct. 17th, 1890, to govern

the logging by the Indians in the Indian reservation of White Earth agency, of Minnesota.

WILLIAM BONGA.
his
PETER x BONGA.
mark.
J. B. BASSETT & CO.,
By WILLIAM L. BASSETT.

In presence of
A. R. ROGERS.
HENRY A. McALISTER.

STATE OF MINNESOTA, } ss:
County of Itasca, }

On the 30th day of Oct. A. D. 1891, before me a notary public, in and for State of Minnesota, personally appeared William and Peter Bonga, by me known to be the parties who executed the foregoing and within instrument, and acknowledged that they executed the same as their free act and deed.

[SEAL.]

A. R. ROGERS,
Notary Public, Minnesota.

STATE OF MINNESOTA, } ss:
County of Hennepin, }

On this third of November A. D. 1891, before me a notary public within the said Hennepin county, State of Minnesota, personally appeared William L. Bassett, known to be a partner in the firm of J. B. Bassett & Co., with full power to execute contracts, and who executed the foregoing and within instrument and acknowledged that he executed the same freely and voluntarily for said J. B. Bassett & Co. of which firm he is a partner.

[SEAL.]

A. R. ROGERS,
Notary Public, Hennepin Co., Minn.

56 STATE OF MINNESOTA, } ss:
County of Itasca, }

On this 30th day of Oct., A. D. 1891, before me personally appeared William and Peter Bonga, who being duly sworn, deposes and says: that (he) is of Indian descent and that he has been, and that he is now living upon and enjoying the privilege of the Mississippi River Indian reservation, and as such, is entitled to the rights and considerations as granted him by the Government of the United States.

[SEAL.]

WILLIAM BONGA.
his
PETER x BONGA.
mark.

Witnesses:
A. R. ROGERS.

A. R. ROGERS,
Notary Public, Minnesota.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS, *November* 27, 1891.

Agreeably with authority of the President, indorsed (November 24th, 1891) on department letter to him, of November 16, 1891, the within contract is hereby approved.

T. J. MORGAN,
Commissioner.

DEPARTMENT OF THE INTERIOR, *November* 27, 1891.

Approved:

JOHN W. NOBLE, *Secretary.*

Indorsed: Filed October 2, 1895. Oscar B. Hillis, clerk. By R. C. Mabey, deputy.

UNITED STATES OF AMERICA, }
District of Minnesota. }

In the Circuit Court, Fourth Division.

UNITED STATES OF AMERICA, Plaintiff,
vs.
PINE RIVER LOGGING AND IMPROVEMENT COMPANY, a Corporation; Joel B. Bassett and William L. Bassett, Copartners as J. B. Bassett & Company, and John S. Pillsbury and Charles A. Smith, Copartners as C. A. Smith & Company, Defendants.

Replying to the separate answer of the defendant, Pine River Logging and Improvement Company, plaintiff

Admits that pursuant to an act of Congress entitled "An act in relation to dead and fallen timber on Indian lands," approved February 16th, 1889, said defendant entered into a contract with one William Fairbanks, an Indian, and that said contract was approved, as in the answer stated. Plaintiff alleges that a true copy of said contract is hereunto attached, marked Exhibit "A," and
57 made a part hereof, and that said contract is the same contract attempted to be set out by defendant in answer to the first, second and third causes of action contained in the complaint.

Plaintiff further admits that the President of the United States had, prior to the making of said contract, prescribed regulations to govern the logging by Indians residing on the reservation named in the complaint, and alleges that his approval of said contract was subject to the regulations so prescribed.

Plaintiff denies that the logs described in its first, second and third causes of action, or any of said logs, were cut pursuant to said contract, or in accordance with the said act of Congress, or with the regulations prescribed by the President of the United States, as aforesaid.

Plaintiff alleges that all of the logs claimed by defendant to have been cut pursuant to said contract, were cut from pine trees which were alive and standing at the time of said cutting.

Plaintiff further admits that prior to April 20th, 1892, the logs

described by defendant in its answer to said first, second and third causes of action, were scaled by a deputy surveyor general for the second lumber district of Minnesota.

Further answering, plaintiff admits that pursuant to the act of Congress above referred to, said defendant entered into a contract with Charles Losh, an Indian, and that said contract was approved as stated in the answer. Plaintiff alleges that a true copy of said contract is hereunto attached marked Exhibit "B," and hereby made a part hereof, and that said contract is the same contract attempted to be set out by defendant in answer to the fifth cause of action contained in the complaint.

Plaintiff further admits that the President of the United States had, prior to the making of said contract, prescribed regulations to govern the logging of Indians, as hereinbefore stated, and alleges that his approval of said contract was subject to the regulations so prescribed.

Plaintiff denies that the logs, or any of them, described in its fifth cause of action, were cut pursuant to said contract, or in accordance with the said act of Congress, or with the regulations prescribed by the President of the United States, as aforesaid.

Plaintiff alleges that of the logs claimed by defendant to have been cut pursuant to said contract, three million one hun-
58 dred and fifty-two thousand two hundred and forty (3,152,240) feet were cut from pine trees which were alive and standing at the time of said cutting.

Plaintiff further admits that prior to April 20th, 1892, the logs described by defendant in its answer to said fifth cause of action, were scaled by a deputy surveyor general for the second lumber district of Minnesota.

Further answering, plaintiff admits that pursuant to the act of Congress, above referred to, said defendant entered into a contract with John Tuttle, an Indian, and that said contract was approved as in the answer stated. Plaintiff alleges that a true copy of said contract is hereunto attached, marked Exhibit "C," and hereby made a part hereof, and that said contract is the same contract attempted to be set out by defendant in answer to the sixth cause of action contained in the complaint.

Plaintiff further admits that the President of the United States had, prior to the making of said contract, prescribed regulations to govern the logging of Indians, as hereinbefore stated, and alleges that his approval of said contract was subject to the regulations so prescribed.

Plaintiff denies that the logs, or any of them, described in its sixth cause of action, were cut pursuant to said contract, or in accordance with the said act of Congress, or with the regulations prescribed by the President of the United States, as aforesaid.

Plaintiff alleges that of the logs claimed by defendant to have been cut pursuant to said contract, one million three hundred and three thousand four hundred and eighty-three (1,303,483) feet were cut from pine trees which were alive and standing at the time of said cutting.

Plaintiff further admits that prior to April 20th, 1892, the logs described by defendant in his answer to said sixth cause of action were scaled by a deputy surveyor general for the second lumber district of Minnesota.

Replying to the answer of said defendant to the fourth, seventh and eighth causes of action, plaintiff admits that contracts similar in form to those hereunto attached, as Exhibits "A," "B" and "C," were made by J. B. Bassett & Company with certain Indians, but denies that the logs described in its fourth, seventh and eighth causes of action, or any of said logs were cut pursuant to said contracts, or in accordance with said act of Congress, or with the regulations prescribed by the President of the United States, as aforesaid.

59 Plaintiff admits that all of the logs described in its complaint herein were taken possession of on or about May 14th, 1892, by J. O. Warriner, a special agent of the General Land Office of the United States, and that thereafter on or about May 27th, 1892, said logs were redelivered to defendants.

Plaintiff further admits that an instrument substantially in the form set forth by defendant in its Exhibit "A" was made by and between Thomas H. Carter, then Commissioner of the General Land Office of the United States, and the defendants named in said contract, and admits that a bond substantially in the form set forth in the answer, was executed, and delivered to the Commissioner of the General Land Office of the United States.

Except as alleged in the complaint or herein expressly admitted or qualified, plaintiff denies each and every allegation, matter and thing in each and every part of the separate answer of the defendants contained.

Wherefore, plaintiff asks judgment, as prayed for in the complaint.

JOHN E. STRYKER,
Plaintiff's Attorney.

STATE OF MINNESOTA, }
County of Ramsey, } ss:

John E. Stryker came before me personally, and having been duly sworn, doth depose and say: That he is a special assistant United States attorney for said district, duly appointed and qualified to prosecute the above-entitled action; that he has read the foregoing reply, and knows the contents thereof, and that the same is true, except as to matters therein stated upon his information and belief, and as to such matters he believes them to be true.

JOHN E. STRYKER.

Subscribed and sworn to before me this 2nd day of October, A. D. 1895.

[NOTARIAL SEAL.]

A. R. MOORE,
Notary Public, Ramsey County, Minnesota.

Exhibit "A."

In and for the considerations below named, William Fairbanks (Indian) party of the first part, hereby enter- into an agreement with the Pine River Logging and Improvement Company (incorporated), as parties of the second part, to cut, haul and deliver during the season of 1891 and 1892, on the Mississippi river below Lake Winibigoshish, about five hundred thousand feet of pine saw-logs, to be cut on the Indian reservation, from dead and down timber, under the supervision of the United States Indian agent, or his deputies. Said logs to be well cut and well marked with the following bark mark, all logs thirty feet and over **E / B** and the following stamp mark all logs thirty feet and over, **C A S**, all logs twenty-eight feet and under to be bark-marked **H / xT**, and stamp-marked. Said party of the first part further agrees to cut, haul and place around said logs a sufficient amount of timber, suitable for boom sticks, and prepare the same in the booming of said logs into rafts of convenient size for driving. Said party of the first part further agrees to hold the second party harmless for any and all claims for labor or otherwise, which are or may be lienable claims and attached upon the said logs, and that all labor must be paid in full. Said party of the first part further agrees that the second party will pay to the United States Indian Department, or its authorized agents, the sum of ten (10) per cent. of purchase price per thousand feet below named, for the stumpage of said timber, which shall be deducted from the price per thousand feet named below.

As a consideration for this agreement, and for the above-named services, the Pine River Logging and Improvement Company hereby agrees to pay to said first party the uniform price of four and 50 / 100 (4.50) dollars per thousand feet board measure, and one-half scalage, for all logs so cut, hauled, marked and landed, in accordance with the following terms, viz: All moneys to be paid to the United States Indian agent, and to be paid so that the amounts will not exceed the following payments:

Three (3) dollars per thousand feet, up to the close of the logging season, when all logs are banked and scaled, and the balance of one dollar and 50 / 100 (1.50) dollars per thousand feet sixty days thereafter.

It is further stipulated and agreed by and between said parties that the scale of the surveyor general for the scalage of logs and lumber in the second district, or his deputies, shall be conclusive and final between said parties.

Signed and dated at Lake Winnibigoshish, Minnesota, this 27th day of October, A. D. 1891.

his
WILLIAM x FAIRBANKS.
mark.
PINE RIVER LOGGING & IMPROVEMENT COMPANY,
By C. A. SMITH, *Sec'ty.*

Pine River Logging & Improvement Company.

Witnesses:
A. R. ROGERS,
As to both.
CLARK CLAY,
As to Fairbanks.
ENOCH BROBERG.

61 STATE OF MINNESOTA, } ss:
County of Itasca, }

On the 27th day of October, A. D. 1891, before me a notary public in and for said State of Minnesota, personally appeared William Fairbanks, by me known to be the person who executed the foregoing and within instrument, and acknowledged that he executed the same as his free act and deed.

[SEAL.]

A. R. ROGERS,
Notary Public, Minnesota.

STATE OF MINNESOTA, } ss:
County of Itasca, }

On this 27th day of October, A. D. 1891, before me personally appeared William Fairbanks, who being duly sworn deposes and says: That he is of Indian descent, that he has been and now is living upon, and enjoying the privileges of the Mississippi Indian reservation, and as such is entitled to the rights and considerations as granted him by the Government of the United States.

his
WILLIAM x FAIRBANKS.
mark.

[SEAL.]

A. R. ROGERS,
Notary Public, Minnesota.

Witness to mark:
CLARK CLAY.
A. R. ROGERS.

STATE OF MINNESOTA, } ss:
County of Hennepin, }

On this 27th day of —— A. D. 1891, before me a notary public within and for said Hennepin county, personally appeared C. A. Smith to me known to be the secretary of the Pine River Logging and Improvement Company (incorporated), who executed the fore-

going and within instrument, and acknowledged that he executed the same freely and voluntarily for the Pine River Logging and Improvement Company (a corporation), of which corporation he is the secretary.

[SEAL.]

A. R. ROGERS,
Notary Public, Hennepin Co., Minnesota.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS, *November* 27, 1891.

Agreeably with authority of the President endorsed (November 24, 1891) on department letter to him of November 16th 1891, the within contract is hereby approved.

T. J. MORGAN,
Commissioner.

DEPARTMENT OF THE INTERIOR, *November 27th*, 1891.

Approved:
JOHN W. NOBLE, *Secretary.*

Copy.

62 EXHIBIT "B."

In and for the considerations below named, Charles Losh, Indian, party of the first part, hereby enters into an agreement with the Pine River Logging and Improvement Company (incorporated), as parties of the second part, to cut, haul and deliver during the season of 1891 and 1892, on the Mississippi river, Ball Club lake, Little Winnebigoshish and Big Winnebigoshish lake, about one million feet more or less of pine saw-logs, to be cut on the Indian reservation, from dead and down timber, under the supervision of the United States Indian agent, or his deputies.

Said logs to be well cut and well marked with the following bark mark: All logs 30 feet and under E A: & HK, and all logs 32 feet and over E\B and the following stamp mark: all logs 30 feet and under Æ & HK and all logs 32 fe-t and over C A S.

Said party of the first part further agrees to cut, haul and place around said logs a sufficient amount of timber, suitable for boom sticks, and prepare the same for the booming of said logs, and make the said booms into rafts of convenient size for driving across the lakes.

Said party of the first part further agrees that all labor shall be paid in full, and that he will hold the second parties harmless from any and all claims for labor or otherwise, which are, or may be lienable claims and attached upon said logs.

Said party of the first part further agrees that second parties will pay to the United States Indian Department, or its authorized agents, the sum stipulated by said department to be paid to it as stumpage for said timber, which amount being ten (10) per cent. of the purchase price, shall be deducted from the price per thousand feet below named.

As a consideration for this agreement, and for the above-named services, the Pine River Logging and Improvement Company hereby agrees to pay to said party of the first part the uniform price of four dollars and fifty cents (4.50) per M feet, for all logs landed on Mississippi river, and on Little Winnebigoshish lake, four dollars and twenty-five cents ($4.25) per M feet for logs landed on Ball Club lake and four dollars ($4.00) per M feet for all logs landed on Big Winnebigoshish lake, and one-half scalage, for all logs so cut, hauled, marked and landed, in accordance with the following terms: Two (2) dollars per M feet for any and all logs landed as above, as fast as scaled and reported, the further sum of one (1) dollar per M feet at the end of the logging season, and the balance to make the price above named, sixty days thereafter.

63 It is further stipulated and agreed by and between said parties, that the scale of the surveyor general for the scaling of logs and lumber in the second district Minnesota, or his deputies, shall be conclusive and final between said parties.

CHARLES LOSH.
PINE RIVER LOG. & IMPROV. CO.,
By C. A. SMITH, *Secretary.*

Pine River Logging & Improvement Co.

Witness:
ENOCH BROBERG.
C. T. CHRISTENSEN.

STATE OF MINNESOTA, } ss:
County of Hennepin, }

On this 31st day of Oct., A. D. 1891, before me a notary public, in and for Hennepin county, personally appeared Charles Losh, by me known to be the person who executed the foregoing and within instrument, and acknowledged that he executed the same as his free act and deed.

[SEAL.] ENOCH BROBERG,
Notary Public, Hennepin Co., Minnesota.

STATE OF MINNESOTA, } ss:
County of Hennepin, }

On this 31st day of Oct. A. D. 1891, before me a notary public, within and for said Hennepin county, personally appeared Charles Losh, who, being duly sworn, deposes and says: That he is of Indian descent; that he has been and now is living upon and enjoying the privileges of the Mississippi Indian reservation as such, and is entitled to the rights and considerations as granted him by the Government of the United States.

[SEAL.] ENOCH BROBERG,
Notary Public, Hennepin Co., Minnesota.

STATE OF MINNESOTA, } ss.
County of Hennepin, }

On this 31st day of Oct. A. D. 1891, before me a notary public, within the said Hennepin county, State of Minnesota, personally appeared Charles A. Smith, to me known to be the secretary of and for the Pine River Logging and Improvement Company (incorporated), who executed the foregoing and within instrument, and acknowledged that he executed the same freely and voluntarily for the Pine River Logging and Improvement Company, of which company he is its secretary.

[SEAL.] ENOCH BROBERG,
Notary Public, Hennepin Co., Minnesota.

64 DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS, *November 27th*, 1891.

Agreeably with authority of the President, indorsed (November 24th, 1891) on department letter to him, of November 16th, 1891, the within contract is hereby approved.

T. J. MORGAN,
Commissioner.

DEPARTMENT OF THE INTERIOR, *November 27th*, 1891.

Approved:
JOHN W. NOBLE, *Secretary.*

Copy.

EXHIBIT "C."

In and for the considerations named below, John Tuttle (Indian), party of the first part, hereby enters into an agreement with the Pine River Logging and Improvement Company (incorporated), as parties of the second part, to cut, haul and deliver during the season of 1891 and 1892, on the Lake Winnibigoshish, and Leech Lake river, about five hundred thousand feet of pine saw-logs, to be cut on the Indian reservation, from dead and down timber, under the supervision of the United States Indian agent, or his deputies. Said logs to be well cut, and well marked for those 30 feet and over in length with the following bark mark E\B, and the following stamp mark C A S, all logs 28 feet and under, with the following bark mark J◊N X, and stamp-marked T P.

Said party of the first part further agrees, to cut, haul and place around said logs a sufficient amount of timber suitable for boom sticks and prepare the same for use in the booming of said logs into rafts of convenient size for driving.

Said party of the first part further agrees to hold the second party harmless for any and all claims for labor or otherwise, which are or may be lienable claims and attached upon the said logs; and that all labor must be paid in full.

Said party of the first part further agrees that second party will

pay to the United States Indian Department, or its authorized agents, the sum of (10) per cent. of purchase price per thousand feet below named, for the stumpage of said timber, which amount shall be deducted from the price per thousand feet below named.

As a consideration for this agreement, and for the above-named services, the Pine River Logging and Improvement Company hereby agrees to pay to said first party the uniform price of four (4) dollars per thousand feet board measure, and one-half scalage, for all logs so cut, hauled, marked and landed, in accordance with the following terms, viz: All money to be paid to the United
65 States Indian agent, and to be paid so that the amounts will not exceed the following payments:

Three (3) dollars per thousand feet up to the close of the logging season, when all logs are banked and scaled, and the balance of one (1) dollar per thousand feet, sixty days thereafter.

It is further stipulated and agreed by and between said parties that the scale of the surveyor general for the scalage of logs and lumber in the second district or his deputies, shall be conclusive and final between said parties.

Signed and dated at Minneapolis, Minnesota, this 4th day of Nov., A. D. 1891.

JOHN his x mark. TUTTLE.

PINE RIVER LOG. AND IMPROVEMENT CO.,
By C. A. SMITH, *Sec'y.*

Pine River Log. & Improvement Company.

A. R. ROGERS.
ENOCH BROBERG.

STATE OF MINNESOTA, *County of Hennepin,* } ss:

On the 4th day of Nov., A. D. 1891, before me a notary public, in and for said county, personally appeared John Tuttle, by me known to be the person who executed foregoing and within instrument, and acknowledged that he executed the same as his free act and deed.

[SEAL.]

A. R. ROGERS,
Notary Public, Hennepin Co., Minn.

STATE OF MINNESOTA, *County of Hennepin,* } ss:

On this 4th day of Nov. A. D. 1891, before me personally appeared John Tuttle, who being duly sworn, deposes and says that he is of Indian descent, that he has been and now is living upon and enjoying the privileges of the Mississippi Indian reservation, and as such

he is entitled to the rights and considerations as granted him by the Government of the United States.

his
JOHN x TUTTLE.
mark.

[SEAL.] A. R. ROGERS,
Notary Public, Hennepin Co., Minnesota.

Witness to mark.
A. R. ROGERS.
ENOCH BROBERG.

66 STATE OF MINNESOTA, } ss:
County of Hennepin, }

On this 4th day of Nov. A. D. 1891, before me a notary public, within and for said Hennepin county, personally appeared C. A. Smith, to me known to be the secretary of the Pine River Logging and Improvement Company (incorporated), who executed the foregoing and within instrument and acknowledged that he executed the same freely and voluntarily for the Pine River Logging and Improvement Company (a corporation) of which corporation he is the secretary.

[SEAL.] A. R. ROGERS,
Notary Public, Hennepin County, Minn.

Agreeably with authority of the President, indorsed (November 24, 1891) on department letter to him, of November 16th, 1891, the within contract is hereby approved.

T. J. MORGAN,
Commissioner.

DEPARTMENT OF THE INTERIOR, *November 27th*, 1891.

Approved:
JOHN W. NOBLE, *Secretary.*

Indorsed: Filed October 2, 1895. Oscar B. Hillis, clerk. By R. C. Mabey, deputy.

Thereafter and on January 9th, 1900 the following order of removal to the third division was made and filed, to wit:

United States Circuit Court, District of Minnesota, Fourth Division.

UNITED STATES OF AMERICA, Plaintiff,
vs.
PINE RIVER LOGGING AND IMPROVEMENT COMPANY, a Corporation; Joel B. Bassett and William L. Bassett, Copartners as J. B. Bassett & Company, and John S. Pillsbury and Charles A. Smith, Copartners as C. A. Smith & Company, Defendants.

Pursuant to the provision of rule XIX of the rules of practice of this court, and the stipulation this day filed herein, duly signed by J. B. Atwater, as attorney for defendants and John E. Stryker, as attorney for plaintiff, it is by the court,

Ordered, that the above-entitled cause be and the same hereby is removed for trial and for such other proceedings as may be had herein, from the fourth division of the district of Minnesota, to the third division thereof.

Dated, January 3d, A. D. 1900.

WM. LOCHREN, *Judge.*

67 UNITED STATES OF AMERICA, } *sct:*
District of Minnesota, Fourth Division, }

I, Henry D. Lang, clerk of the circuit court of the United States for the district of Minnesota, do hereby certify that I have carefully compared the foregoing paper-writing with the original thereof, which is in my custody as such clerk, and that such copy is a correct copy of such original and of the whole thereof, in the cause therein named.

Witness my hand as clerk, and the seal of said court. Done at my office in Minneapolis, Minnesota, this third day of January, A. D. 1900.

[SEAL OF COURT.] HENRY D. LANG, *Clerk,*
By ROBERT C. MABEY, *Deputy.*

Indorsed: Certified copy of order for removal to third division. Filed January 9th, 1900. Henry D. Lang, clerk. By Louise B. Trott, deputy.

And thereafter the following orders were entered in the term minutes, being the record of trial of said cause, to wit: June 29th, 30th, July 2nd, 3rd, 5th, and on the 6th of July a verdict was filed in favor of the plaintiff and judgment for plaintiff entered, in the words and figures following:

United States Circuit Court for the District of Minnesota.

Term Minutes, June Term, A. D. 1900.

FRIDAY MORNING, *June 29th,* 1900.

Court opened pursuant to adjournment.

Present: Hon. Charles F. Amidon, judge. Hon. Robert G. Evans, U. S. dist. attorney. Hon. Wm. H. Grimshaw, U. S. marshal. Henry D. Lang, clerk.

UNITED STATES OF AMERICA
vs.
PINE RIVER LOGGING AND IMPROVEMENT COMPANY, a Corporation; Joel B. Bassett and William Bassett, Copartners as J. B. Bassett & Company, and John S. Pillsbury and Charles A. Smith, Copartners as C. A. Smith & Company. } E. Law. 1263.

This cause being regularly called for trial in its order on the calendar, the parties appear by their respective attorneys, John E. Stryker, Esq., and Milton D. Purdy, Esq., appearing on behalf of the

plaintiff, and John B. Atwater, Esq., W. H. Bennett, and Eugene G. Hay, Esq., appearing on behalf of the defendants, whereupon on motion of plaintiff's said attorneys it is ordered that a jury come, to wit:

68 Peter M. Anderson, J. W. Andrews,
O. C. Eaton, Charles Miller,
A. P. T. Suppel, R. G. Curtis,
C. E. Mosier, James I. Huff,
Moses Seelye, J. N. Love,
A. C. Wilson, William Bristol,

twelve good and lawful men who are duly sworn to try the issues joined in this cause and the trial thereof is thereupon proceeded with as follows, to wit:

And here the court takes a recess until 2 o'clock p. m.

The court resumes proceedings at two o'clock p. m.

John E. Stryker, Esq., opens the case to the jury on behalf of the plaintiff.

Dr. James Walker is called, sworn and examined as a witness on behalf of the plaintiff.

William L. Maddy is called, sworn and examined as a witness on behalf of the plaintiff.

Henry F. Buring is called, sworn and examined as a witness on behalf of the plaintiff.

Daniel Morrison is sworn as an interpreter.

Mo-se-mo is called and sworn and examined as a witness on behalf of the plaintiff through Daniel Morrison, the interpreter.

And the trial of said cause not being concluded at the hour of adjournment it is ordered that further proceedings herein be and they hereby are postponed until tomorrow morning at 9.30 o'clock.

A true record.

Attest: HENRY D. LANG, *Clerk.*

United States Circuit Court for the District of Minnesota.

Term Minutes, June Term, A. D. 1900.

SATURDAY MORNING, *June 30th*, 1900.

Court opened pursuant to adjournment.

Present: Hon. Charles F. Amidon, judge. Hon. Robert G. Evans, U. S. district attorney. Hon. Wm. H. Grimshaw, U. S. marshal. Henry D. Lang, clerk.

UNITED STATES OF AMERICA
vs.
PINE RIVER LOGGING AND IMPROVEMENT COMPANY *et al.* } E. Law. 1263.

This day again come the parties to this cause, by their respective attorneys also the jury sworn to try the same and the trial thereof is proceeded with as follows, to wit:

The plaintiff here offers certain documentary testimony in evidence.

Daniel Morrison is sworn generally as an interpreter in this cause.

69 James Drumbeater is called, sworn and examined as a witness on behalf of the plaintiff through the interpreter Daniel Morrison.

I-Ah-Bance is called, sworn and examined as a witness on behalf of the plaintiff through the interpreter Daniel Morrison.

Edward L. Warren is called, sworn and examined as a witness on behalf of the plaintiff.

Charles Wood is called, sworn and examined as a witness on behalf of the plaintiff.

And the trial of said cause not being concluded at the hour of adjournment, it is by the court ordered that further proceedings herein be and they hereby are postponed until Monday morning next at 10 o'clock.

A true record.

Attest: HENRY D. LANG, *Clerk.*

United States Circuit Court for the District of Minnesota.

Term Minutes, June Term, A. D. 1900.

MONDAY MORNING, *July 2nd*, 1900.

Court opened pursuant to adjournment.

Present: Hon. Charles F. Amidon, judge; Hon. Robert G. Evans, U. S. dist. att'y; Hon. Wm. H. Grimshaw, U. S. marshal; Henry D. Lang, clerk.

UNITED STATES OF AMERICA
vs.
PINE RIVER LOGGING AND IMPROVEMENT COMPANY *et al.* } E. Law. 1263.

This day again come the parties to this cause by their respective attorneys and upon the call of the roll of the jurors, duly empanelled and sworn to try the same Juror O. C. Eaton fails to respond to his name.

Whereupon the said O. C. Eaton is duly openly and in a loud tone of voice called by the crier to come into court, and after waiting more than an hour the said juror O. C. Eaton comes not; and thereupon it is by the court ordered that an attachment issue instanter for the said juror O. C. Eaton, and that the same be delivered immediately to the marshal for service.

It is now made to appear to the court that William Bristol a juror duly empanelled and sworn to try this cause has been suddenly seized with an illness, and is now utterly unable to further sit upon the trial thereof.

Whereupon, upon the consent and agreement of all the attorneys for the respective parties hereto, it is by the court ordered that
70 said juror William Bristol, be and he hereby is excused from the further consideration of this cause, and from further serv-

ice as a juror at this term, and that the trial of this cause be proceeded with without the said juror William Bristol and with the eleven remaining jurors, sworn to try the cause, with the same force and effect and as fully and completely as if the same had been tried by a jury of twelve men.

And the trial of said cause not being concluded at the hour of adjournment, it is by the court ordered that further proceedings herein be and the same hereby are postponed and continued until tomorrow morning at half past nine o'clock.

A true record.

Attest: HENRY D. LANG, *Clerk.*

United States Circuit Court for the District of Minnesota.

Term Minutes, June Term, A. D. 1900.

JULY 3RD, 1900.

Tuesday morning.—Court opened pursuant to adjournment.

Present: Hon. Charles F. Amidon, judge; Hon. Robert G. Evans, U. S. district att'y; Hon. Wm. H. Grimshaw, U. S. marshal; Henry D. Lang, clerk.

UNITED STATES OF AMERICA
vs.
PINE RIVER LOGGING AND IMPROVEMENT COMPANY *et al.* } E. Law. 1263.

This day again come the parties to this cause by their respective attorneys also the jury sworn to try the same and the trial thereof is proceeded with as follows, to wit:

William Fairbanks is called, sworn and examined as a witness on behalf of the plaintiff.

John Lyons is called, sworn and examined as a witness on behalf of the plaintiff.

Charles C. Walker is called, sworn and examined as a witness on behalf of the plaintiff.

Paul Bonga is called, sworn and examined as a witness on behalf of the plaintiff.

Leroy Wheaton is called, sworn and examined as a witness on behalf of the plaintiff.

Josiah O. Warriner is called, sworn and examined as a witness on behalf of the plaintiff.

And here the court takes a recess until two o'clock p. m.

The court resumes proceedings at two o'clock p. m.

Josiah O. Warriner is recalled and further examined as a witness (*as a witness*) on behalf of the plaintiff.

The testimony of L. C. Warriner, a witness on behalf of the plaintiff, is read in evidence.

Albert Neiderer is called, sworn and examined as a witness on behalf of the plaintiff.

Charles A. Smith is called, sworn and examined as a witness on behalf of the plaintiff, for cross-examination under the statute.

71 Healey C. Akely is called, sworn and examined as a witness on behalf of the plaintiff.

And the trial of said cause not being concluded at the hour of adjournment, it is by the court ordered that further proceedings herein be and they hereby are postponed until tomorrow morning at 10 o'clock.

A true record.

Attest: HENRY D. LANG, *Clerk.*

United States Circuit Court for the District of Minnesota.

Term Minutes, June Term, A. D. 1900.

JULY 5TH, 1900.

Thursday morning.—Court opened pursuant to adjournment.

Present: Hon. Charles F. Amidon, judge; Hon. Robert G. Evans, U. S. district att'y; Hon. Wm. H. Grimshaw, U. S. marshal; Henry D. Lang, clerk.

UNITED STATES OF AMERICA
vs.
PINE RIVER LOGGING AND IMPROVEMENE COMPANY *et al.* } E. Law. 1263.

This day come again the parties to this cause by their respective attorneys also the jury sworn to try the same, and the trial thereof is proceeded with as follows, to wit:

Leroy Wheaton is recalled and further examined as a witness on behalf of the plaintiff.

And here the plaintiff rests.

The defendant here moves the court that the plaintiff now be required to elect and state the place at which the alleged conversation took place.

The court grants said motion and the plaintiff accordingly makes such selection.

John B. Atwater, Esq., opens the case to the jury on behalf of the defendants.

Defendants here offer certain documentary testimony in evidence.

Lewis W. Brown is called, sworn and examined as a witness on behalf of the defendants.

And here the court takes a recess until 2 o'clock p. m.

The court resumes proceedings at 2 o'clock p. m.

Charles A. Smith is recalled and further examined as a witness on behalf of the defendants.

Frank C. Gerhard is called, sworn and examined as a witness on behalf of the defendants.

Arno Marine is called, sworn and examined as a witness on behalf of the defendants.

William L. Bassett is called, sworn and examined as a witness on behalf of the defendants.

And here the defendants rest.

72 Essington H. Funk is called, sworn and examined as a witness on behalf of the plaintiff in rebuttal.

And here the plaintiff again rests and the testimony is closed.

The plaintiff here moves the court to instruct the jury to find and return into court a verdict in favor of the plaintiff for the value of the logs cut in excess of the contract at the time of the seizure in the spring of the year 1892.

John E. Stryker, Esq., argues the motion on behalf of the plaintiff and John B. Atwater, Esq., argues in opposition thereto on behalf of the defendants and after hearing the arguments and statements of counsel for the respective parties the court takes said motion under advisement.

And the trial of said cause not being concluded at the hour of adjournment, it is by the court ordered that further proceedings herein be and the same hereby are postponed until 10 o'clock to-morrow morning.

A true record.

Attest: HENRY D. LANG, *Clerk.*

United States Circuit Court for the District of Minnesota.

Term Minutes, June Term, A. D. 1900.

JULY 6TH, 1900.

Friday morning.—Court opened pursuant to adjournment.

Present: Hon. Charles F. Amidon, judge; Hon. Robert G. Evans, U. S. dist. attorney; Hon. Wm. H. Grimshaw, U. S. marshal; Henry D. Lang, clerk.

UNITED STATES OF AMERICA *vs.* PINE RIVER LOGGING AND IMPROVEMENT COMPANY, a Corporation; Joel B. Bassett and William Bassett, Copartners as J. B. Bassett & Company, and John S. Pillsbury and Charles A. Smith, Copartners as C. A. Smith & Company.	E. Law. 1263.

This day come again the parties to this cause by their respective attorneys also the jury sworn to try said cause and the trial thereof is proceeded with as follows, to wit:

The plaintiff here moves the court to strike from the record all the testimony offered and introduced by the defendants tending to show good faith which said motion is, without argument, denied. The plaintiff here renews its motion that the court instruct the jury to find and return into court a verdict for the plaintiff making the same more specific however, in this that the court instruct the jury to find and return into court a verdict in favor of the plaintiff for the sum of $59,401.04 with interest thereon at the rate of six per cent. per annum since May 31st, A. D. 1892, and after due consideration the court grants said motion and instructs the jury accordingly.

73 Whereupon the jury, instanter and without leaving the box, by their foreman, find and return into court their verdict herein, which is as follows, to wit:

"We, the jury in the above-entitled cause, by direction of the court, find for the plaintiff and assess its damages at the sum of eighty-eight thousand two hundred and sixty-nine and $\frac{94}{100}$ dollars ($88,269.94).

Dated this 6th day of July, 1900.

C. E. MOSIER, *Foreman.*"

It is therefore by the court considered, ordered and adjudged that The United States of America, the plaintiff herein, do have and recover of and from The Pine River Logging and Improvement Company, a corporation, Joel B. Bassett and William Bassett, copartners as J. B. Bassett & Company, and John S. Pillsbury and Charles A. Smith, copartners as C. A. Smith and Company, the defendants herein, and from each of them the aforesaid sum of eighty-eight thousand two hundred sixty-nine and $\frac{94}{100}$ dollars ($88,269.94) so found to be due by the jury, together with the costs and disbursements of this action to be taxed, and that it have execution therefor.

On motion of the defendants' attorneys, the plaintiff's attorneys consenting thereto, it is by the court ordered that all proceedings herein except the taxation of costs and the entry of judgment therefor, be and the same hereby are stayed for the period of forty-two days from this date to enable the defendants to prepare a bill of exceptions and make and present a motion for a new trial.

And on the same day the following verdict was filed of record in said cause, to wit:

United States Circuit Court, District of Minnesota, Third Division.

UNITED STATES OF AMERICA, Plaintiff, *vs.* PINE RIVER LOGGING AND IMPROVEMENT COMPANY, a Corporation; Joel B. Bassett and William L. Bassett, Copartners as J. B. Bassett & Company, and John S. Pillsbury and Charles A. Smith, Copartners as C. A. Smith and Company, Defendants.	1263. Verdict. E. Law.

We, the jury in the above-entitled cause, by direction of the court, find for the plaintiff and assess its damages at the sum of eighty-eight thousand two hundred sixty-nine and $\frac{94}{100}$ dollars ($88,269.94).

Dated this 6th day of July, 1900.

C. E. MOSIER, *Foreman.*

74 Indorsed: Verdict for plaintiff ($88,269.94). Filed July 6th, 1900. Henry D. Lang, clerk. Judgment-roll signed this 6th day of July A. D. 1900. Henry D. Lang, clerk. By Louise B. Trott, deputy.

Damages	$88,269.94
Costs	5,320.66
Total	$93,590.60

Indorsed: Judgment-roll. Filed July 6th, 1900. Henry D. Lang, clerk. By Louise B. Trott, deputy.

Thereafter and on July 21st, 1900, the following taxation of costs was filed in said cause, to wit:

United States Circuit Court, District of Minnesota, Third Division.

UNITED STATES OF AMERICA, Plaintiff,
vs.
PINE RIVER LOGGING & IMPROVEMENT COMPANY, a Corporation; Joel B. Bassett and William L. Bassett, Copartners as J. B. Bassett & Company, and John S. Pillsbury and Charles A. Smith, Copartners as C. A. Smith & Company, Defendants.

Attorneys' docket fee, trial March term, 1896	$20.00
Attorneys' docket fee, trial September term, 1897	20.00
Attorneys' docket fee, trial June term, 1900	20.00
Disbursements.	
Marshal's fees, service of summons	10.90
Marshal's fees for subpœnaing witnesses, trial March term, 1896	167.74
Marshal's fees for subpœnaing witnesses, trial September term, 1897	198.15
Marshal's fees for subpœnaing witnesses, trial June term, 1900	73.90
Interpreter's fees, trial September term, 1897	51.80
Interpreter's fees, trial June term, 1900	45.00
Clerk's fees to be taxed (for amounts see page 9 hereof).	
Five affidavits at $.25	1.25
Actual and necessary expense of witness James R. Walker, agency physician at Coleville Indian agency, Wash., trial March term, 1896: Travel, $139.50; hotel bill, Minneapolis, March 15-19, $15	154.50
Actual and necessary expense of witness James R. Walker, agency physician at Pine Ridge agency, S. D., trial Sept. term, 1897: Travel, $57.78; hotel bill, Minneapolis, Sept. 13-23, $27.78	85.58
Actual and necessary expense of witness James R. Walker, agency physician at Pine Ridge, S. D., trial June term, 1900: Travel, $49.90; hotel bill, St. Paul, June 26 to July 7, $39.75	89.65
Reporter's fees for record, second trial for appeal	356 69
Carried forward to page 9	$1,295.16

75 *Witness Fees at Trial March Term*, 1896.
March 17th and 18th, 1896.

Names.	Residence.	No. of days.	Amount.	Miles.	Amount.	Total am't.
Gallagher James	Carlton	2	$3.00	288	$13.40	$16.40
Gaffney Andy	28 mi. north Grand Rapids.	2	3.00	554	27.70	30.70
Wood C. H.	Grand Rapids	2	3.00	498	24.90	27.90
Buring H. F.	20 mi. N. W. Deer river.	2	3.00	568	28.40	31.40
Goodwin W. W.	Deer river	2	3.00	528	26.40	29.40
Casey Albert	21 mi. north Grand Rapids.	2	3.00	538	26.90	29.90
Sherer H. B.	23 mi. north Grand Rapids.	2	3.00	544	27.20	30.20
Allen Frank	Grand Rapids	2	3.00	498	24.90	27.90
Hildreth C. S.	Deer river	2	3.00	528	26.40	29.40
Seelye Chas	19 mi. east Grand Rapids.	2	3.00	536	26.80	29.80
McDonald Sidney	18 mi. S. W. Grand Rapids.	2	3.00	534	26.70	29.70
Lawrence F. B.	9 mi. north Grand Rapids.	2	3.00	516	25.80	28.80
Clark C. A. B.	12 mi. west Deer river.	2	3.00	552	27.60	30.60
Warren John	3 mi. West Pomford.	2	3.00	460	23.00	26.00
Shortly James	3 mi. N. W. Cloquet.	2	3.00	286	14.30	17.30
Anderson Louis	Grand Rapids	2	3.00	498	24.90	27.90
Losh Charles	8 mi. north Deer river.	2	3.00	544	27.20	30.20
Lyons John	16 mi. N. W. Deer river.	2	3.00	560	28.00	31.00
Tuttle John	16 mi. N. W. Deer river.	2	3.00	560	28.00	31.00
Funk E. H.	White Earth	2	3.00	432	21.60	24.60
Brown Thomas	35 mi. west Grand Rapids.	2	3.00	568	28.40	31.40
Harris Duncan	Grand Rapids	2	3.00	498	24.90	27.90
Robertson D. C.	Grand Rapids	2	3.00	498	24.90	27.90
McDonald Jas	18 mi. S. W. Grand Rapids.	2	3.00	534	26.70	29.70
Fairbanks Wm	25 mi. N. W. Deer river.	2	3.00	578	28.90	31.90
Rabbitt Will	8 mi. north Deer river.	2	3.00	544	27.20	30.20
Ga-gag	8 mi. west Deer river.	2	3.00	544	27.20	30.20
Drumbeater Jim	8 mi. north Deer river.	2	3.00	544	27.20	30.20
Reiz Geo	28 mi. north Deer river.	2	3.00	584	29.20	32.20
Smith John	28 mi. north Deer river.	2	3.00	584	29.20	32.20
Mat-qua-we-wange	28 mi. north Deer river.	2	3.00	584	29.20	32.20
Galbreath Geo	8 mi. north Deer river.	2	3.00	544	27.20	30.20
Fisher James	Leech lake	2	3.00	388	19.40	22 40
Bonga Peter	Leech lake	2	3.00	388	19.40	22.40
Smith John	Leech lake	2	3.00	388	19.40	22.40
Sturgeon-Man	Leech lake	2	3.00	388	19.40	22.40
76 Bonga Jack	Leech lake	2	3.00	388	19.40	22.40
Bonga Paul	Leech lake	2	3.00	388	19.40	22.40
Ah-nah-me-ay-gaw-bow	Leech lake	2	3.00	388	19.40	22.40
Hudson Henry	Leech lake	2	3.00	388	19.40	22.40
Fairbanks John Geo	Leech lake	2	3.00	388	19.40	22.40
Day-dah-cum-udg-e-waib	Leech lake	2	3.00	388	19.40	22.40
Bonga Wm	Leech lake	2	3.00	388	19.40	22.40
I-ah-bance	White Earth	1	1.50	432	21.60	23.10
Dempsey J. M.	Sandstone	1	1.50	222	11.10	12.60
Warriner J. O.	Tomah, Monroe Co., Wis.	2	3.00	362	18.10	21.10
			$135.00		$1,094.50	$1,229.50

Total witness fees and mileage at trial March term 1896, carried forward to page 9,.... $1,229.50

All of the witnesses whose attendance at the trial had at the March term, 1896, are noted above, except I-ah-bance and J. M. Dempsey, were in attendance on the 17th and 18th days of March, 1896, and said I-ah-bance and Dempsey were in attendance on said 18th day of March, 1896.

Witness Fees at Trial Sept. Term, 1897.

September 13th to 24, inclusive, 1897.

Names.	Residence.	No. of days.	Amount.	Mls.	Amount.	Total amount.
Maddy W. L.	20 mi. N.W. Deer river.	2 Sept. 13 & 14	$3.00	492	$24.60	$27.60
Vance F. L.	85 mi. N. Deer river.	2 Sept. 13 & 14	3.00	622	31.10	34.10
Shelden F. P.	Grand Rapids.	2 Sept. 13 & 14	3.00	422	21.10	24.10
Powers H. D.	Grand Rapids.	2 Sept. 13 & 14	3.00	422	21.10	24.10
Dempsey J. M.	Sandstone	2 Sept. 13 & 14	3.00	222	11.10	14.10
Warren E. L.	Detroit	2 Sept. 13 & 14	3.00	388	19.40	22.40
Jude William.	51 mi. N. E. Aitkin.	4 Sept. 13, 14, 15 & 16	6.00	478	23.90	29.90
Bonga Paul.	Leech lake.	4 Sept. 13, 14, 15 & 16	6.00	386	19.30	25.30
Bonga Jack.	Leech lake.	10 Sept. 13 to 22 inc.	15.00	386	19.30	34.30
Bonga Peter.	Leech lake.	4 Sept. 13, 14, 15 & 16	6.00	386	19.30	25.30
I-ah-bance.	20 mi. east Beaulieu.	4 Sept. 13, 14, 15 & 16	6.00	510	25.50	31.50
Niederer Albert.	6 mi. N. E. Cross lake.	2 Sept. 16 & 17	3.00	332	16.60	19.60
Rabbitt Will.	16 mi. N.W. Deer river.	5 Sept. 13 to 17 inc.	7.50	484	24.20	31.70
No-din-nah-quaum.	7 mi. N. E. Pomford.	5 Sept. 13 to 17 inc.	7.50	470	23.50	31.00
No-din-nah-quaum-once.	Leech lake.	5 Sept. 13 to 17 inc.	7.50	386	19.30	26.80
Me-sha-quod John.	7 mi. N. E. Pomford.	5 Sept. 13 to 17 inc.	7.50	470	23.50	31.00
Brown Thomas.	12 mi. west Deer river.	5 Sept. 13 to 17 inc.	7.50	476	23.80	31.30
77						
Goodwin W. W.	Deer river	5 Sept. 13 to 17 inc.	7.50	452	22.60	30.10
Neveux Joe.	Deer river	5 Sept. 13 to 17 inc.	7.50	452	22.60	30.10
Funk E. H.	Ada	5 Sept. 13 to 17 inc.	7.50	514	25.70	33.20
Marr C. H.	Grand Rapids.	5 Sept. 13 to 17 inc.	7.50	422	21.10	28.60
Affleck Geo.	8 mi. north Grand Rapids.	5 Sept. 13 to 17 inc.	7.50	438	21.90	29.40
Tallman H. S.	Brainerd	4 Sept. 13, 16, 17 & 18.	6.00	256	12.80	18.80
Card L. S.	12 mi. west Deer river.	6 Sept. 13 to 18 inc.	9.00	476	23.80	32.80
Day-dah-cum-udg-e-waib.	Leech lake	6 Sept. 13 to 18 inc.	9.00	386	19.30	28.30
Reiz George.	60 mi. N. E. Deer river.	6 Sept. 13 to 18 inc.	9.00	572	28.60	37.60
Hudson Henry.	Leech lake.	6 Sept. 13 to 18 inc.	9.00	386	19.30	28.30
Shortley James.	Cloquet	6 Sept. 13 to 18 inc.	9.00	280	14.00	23.00
Bassett John.	Leech lake.	9 Sept. 14 to 22 inc.	13.50	386	19.30	32.80
Lagard Moses.	7 mi. N. E. Pomford.	6 Sept. 13 to 18 inc.	9.00	470	23.50	32.50
Sturgeon-man	7 mi. N. E. Pomford.	6 Sept. 13 to 18 inc.	9.00	470	23.50	32.50
Mo-se-mo.	60 mi. N. E Deer river.	6 Sept. 13 to 18 inc.	9.00	572	28.60	37.60
Warren John.	7 mi. N. E. Pomford.	6 Sept. 13 to 18 inc.	9.00	470	23.50	32.50
Fuller N. T.	55 mi. N.W. Deer river.	6 Sept. 13 to 18 inc.	9.00	562	28.10	37.10
Casey Albert.	22 mi. N. E. Grand Rapids.	6 Sept. 13 to 18 inc.	9.00	466	23.30	32.30
Walker C. C.	16 mi. S. W. Grand Rapids.	6 Sept. 13 to 18 inc.	9.00	454	22.70	31.70
Jordan M.	18 mi. east Deer river.	6 Sept. 13 to 18 inc.	9.00	488	24.40	33.40
Fairbanks J. George.	36 mi. N.W. Deer river.	6 Sept. 13 to 18 inc.	9.00	524	26.20	35.20

Names.	Residence.	No. of days.	Amount.	Mls.	Amount.	Total amount.
Bell W. K.....	55 mi. west Deer river.	6 Sept. 13 to 18 inc.	9.00	562	28.10	37.10
Hildreth Chas. S.	Deer river.....	6 Sept. 13 to 18 inc.	9.00	452	22.60	31.60
Drumbeater Jim	16 mi. N.W. Deer river.	6 Sept. 13 to 18 inc.	9.00	484	24.20	33.20
Ellingsen John...	25 mi N. E. Leech lake.	Government dam-keeper—actual and necessary expense—travel, $35.25; hotel bill, Mnpls., 3 days, Sept. 12-14, $6.00.....				41.25

Names.	Residence.	No. of days.	Amount.	Mls.	Amount.	Total amount.
Warriner L. C....	Grand Rapids.....	8 Sept. 13 to 20 inc.	12.00	422	21.10	33.10
Wheaton Leroy..	Grand Rapids.....	9 Sept. 13 to 21 inc.	13.50	422	21.10	34.60
Bonga Wm.....	Leech lake.....	10 Sept. 13 to 22 inc.	15.00	386	19.30	34.30
Fairbanks Wm...	28 mi. N.W. Deer river.	10 Sept. 13 to 22 inc.	15.00	508	25.40	40.40
Tuttle John	16 mi. N.W. Deer river.	10 Sept. 13 to 22 inc.	15.00	484	24.20	39.20
Lyons John.....	16 mi. N.W. Deer river.	10 Sept. 13 to 22 inc.	15.00	484	24.20	39.20
78						
Jackson John.....	20 mi. N.W. Deer river.	10 Sept. 13 to 22 inc.	15.00	492	24.60	39.60
Buring H. F.....	20 mi. N.W. Deer river.	10 Sept. 13 to 22 inc.	15.00	492	24.60	39.60
Clark C. A. B.....	16 mi. N. E. Grand Rapids.	10 Sept. 13 to 22 inc.	15.00	454	22.70	37.70
Seelye C. E..... ...	4 mi. S. E. Grand Rapids.	10 Sept. 13 to 22 inc.	15.00	430	21.50	36.50
Sherer H. B.....	30 mi. north Deer river.	10 Sept. 13 to 22 inc.	15.00	512	25.60	40.60
Warriner J. O.....	20 mi. north Tomah, Wis.	12 Sept. 13 to 24 inc.	18.00	402	20.10	38.10
Gallagher Jas.....	Floodwood.....	10 Sept. 13 to 22 inc.	15.00	350	17.50	32.50
			$501.00		$1,208.20	$1,750.45
Total witness fees and mileage at trial Sept. term, 1897, carried forward to page 9...						$1,750.45

Witness Fees at Trial June Term, 1900.

June 28th to July 6th, inclusive, 1900.

Names.	Residence.	No. of days.	Amount.	Miles.	Amount.	Total amount.
Akeley H. C.....	Minneapolis.....	5 June 29 to July 3, inc.	$7.50	24	$1.20	$8.70
Sims J. P.....	Deer river.....	5 June 29 to July 3, inc.	7.50	538	26.90	34.40
Vance F. L.....	Moose Lodge.....	6 June 28 to July 3, inc	9.00	778	38.90	47.90
Lyons John.....	6 mi. N. Winnibigoshish dam.	6 June 28 to July 3, inc.	9.00	630	31.50	40.50
Mo-se-mo Chief...	6 mi. N. Winnibigoshish dam.	6 June 28 to July 3, inc.	9.00	630	31.50	40.50
Drumbeater Jas..	6 mi. N. Winnibigoshish dam.	6 June 28 to July 3, inc.	9.00	630	31.50	40.50
I-ah-bance.....	28 mi N. White Earth agency.	5 June 29 to July 3, inc.	7.50	506	25.30	32.80
Fairbank Wm.....	Winnibigoshish dam.	4 June 30 to July 3, inc.	6.00	618	30.90	36.90
Maddy W. L.....	Leech Lake dam	6 June 28 to July 3, inc.	9.00	594	29.70	38.70
Wood Chas. H.....	Leech Lake dam.	6 June 28 to July 3, inc.	9.00	594	29.70	38.70
Walker Chas. C...	Leech Lake dam.	6 June 28 to July 3, inc.	9.00	594	29.70	38.70

Names.	Residence.	No. of days.	Amount.	Miles.	Amount.	Total amount.
Neiderer Alb't A.	Cross lake	2 July 2 and 3.	3.00	340	17.00	20.00
Baring Henry F.	Moose Lodge	8 June 28 to July 5, inc	12.00	788	39.40	51.40
Bonga Paul	Leech lake	8 June 28 to July 5, inc.	12.00	408	20.40	32.40
Powers H. D.	Grand Rapids	8 June 28 to July 5, inc	12.00	510	25.50	37.40
Funk E. H.	Ada	8 June 28 to July 5, inc.	12.00	534	26.70	38.70
Marr Chas H.	Grand Rapids	8 June 28 to July 5, inc.	12.00	510	25.50	37.50
Bonga Peter	Leech lake	1 July 5.	1.50	408	20.40	21.90
Wheaton Leroy	Grand Rapids	9 June 28 to July 6, inc.	13.50	510	25.50	39.00
Sheldon F. P.	Grand Rapids	8 June 28 to July 5, inc.	12.00	510	25.58	37.50
Warren Edw'd L.	Walker	1 June 29.	1.50	396	19 80	21.30
Warriner J. O.	Muscogee, I. T.	9 June 28 to July 5, inc.	13.50	1,726	86.30	99.80
Carried forward to page 9						$835.30

79 Amount brought forward from first page of bill of costs..... $1,295.16
Total witness' fees and mileage at trial March term, 1896 (page 4). 1,229.50
Total witness' fees and mileage at trial Sept. term, 1897 (page 7)..... 1,750.45
Total witness' fees and mileage at trial June term, 1900 (page 8)..... 835.30

Fees of clerk of court to be taxed as follows:

Clerk's fees on first trial	$69.90	
" " " second trial	108 50	
" " " third "	31.85	
Total clerk's fees		210.25

N. B.—Reference for further details of the foregoing items of disbursements is had to the approved accounts of the U. S. marshal for the above-named district on file in the office of the clerk of the U. S. district court for the district and division aforesaid.

St. Paul, Minn., July 21st, 1900. Costs taxed and allowed at..... $5,320.66

HENRY D. LANG,
Clerk of U. S. Circuit Court for the District of Minnesota.

United States Circuit Court, District of Minnesota, Third Division, Office of the Clerk, *ss:*

John E. Stryker came before me personally and having been duly sworn on oath says, that he is the attorney for the plaintiff in the above-entitled cause; that the foregoing is a true and correct statement of the costs and disbursements of said plaintiff in said cause and that all of the items of said disbursements have been actually and necessarily paid or incurred therein by and on behalf of said plaintiff; that each of the witnesses above named resides at the place stated opposite his name and actually attended upon the trial of said cause the number of days above set forth and traveled necessarily in going from his place of residence to the place of trial of said cause and in returning to his said place of residence by the usual route of travel between said places the number of miles above set opposite

his name and each of said witnesses was a necessary and material witness for said plaintiff; that none of said witnesses were sworn or testified at the trial held at the March term 1896, because the court granted a motion, made by defendants at said trial, for judgment on the pleadings; that no notice of said motion was given prior to the trial and it was not safe for plaintiff to go to trial without said witnesses and plaintiff's attorney caused them to be subpœnaed and attend said trial believing that they and all of them would be sworn and testify on behalf of plaintiff at said trial; that all of the witnesses who were in attendance at the trial of said cause at the September term, 1897, as stated in said bill of costs except John Tuttle, C. E. Seelye and James Galbreath were duly sworn, examined and testified on behalf of said plaintiff upon said trial and that said Tuttle, Seelye and Galbreath were subpœnaed and were present at said trial by agreement between plaintiff and defendants and
80 at the request of the defendants; that the following-named witnesses, H. C. Akeley, John Lyons, Mo-se-mo, Drumbeater, I-ah-bance, William Fairbanks, W. L. Maddy, Charles H. Wood, Charles C. Walker, Albert A. Neiderer, Henry F. Buring, Paul Bonga, H. Funk, Leroy Wheaton, Edward L. Warren, James R. Walker, and J. O. Warriner, who were in attendance at the trial of said cause held at the June term, 1900, as stated in said bill of costs, were duly sworn, examined and testified on behalf of said plaintiff in said cause at said trial and that it was not safe for plaintiff to go to trial at said term without the presence of witnesses F. L. Vance, Charles H. Marr, H. D. Powers and F. P. Sheldon, all of whom were required to show the connection of defendants with the tort set out in the complaint and said last-mentioned witnesses were not called to testify because of admissions made by the defendants at the trial, which admissions were not of record, and plaintiff's attorney could not rely upon said admissions prior to said trial.

JOHN E. STRYKER.

Subscribed and sworn to before me this 18th day of July, A. D. 1900.

HENRY D. LANG,
Clerk U. S. Circuit Court, District of Minnesota.

[Seal U. S. Circuit Court, Dist. of Minn.]

Copy.

To John B. Atwater, Esq., attorney for the defendants in the above-entitled action.

SIR: Please take notice that the costs and disbursements of the plaintiff in said action will be taxed by and before Henry D. Lang, Esq., clerk of the above-named court, at his office in the Federal building, in the city of St. Paul, Minnesota, on Saturday the 21st day of July, 1900, at ten (10) o'clock in the forenoon of said day, and that the foregoing is a statement of the items of costs and disbursements that will then and there be claimed with interest on behalf of

said plaintiff and inserted in the judgment against the defendants in said action.

Respectfully, JOHN E. STRYKER,
Attorney for Plaintiff.

Service of the within admitted this 18th day of July, A. D. 1900.
J. B. ATWATER,
Att'y for Def't.

Indorsed: Bill of costs and notice of taxation. Filed July 21st, 1900. Henry D. Lang, clerk.

81 And on the same day the following objections to the taxation of costs were filed of record in said cause, to wit:

United States Circuit Court, District of Minnesota, Third Division.

UNITED STATES OF AMERICA, Plaintiff,
vs.
PINE RIVER LOGGING & IMPROVEMENT COMPANY, a Corporation; Joel B. Bassett and William L. Bassett, Copartners as J. B. Bassett & Company, and John S. Pillsbury and Charles A. Smith, Copartners as C. A. Smith & Company, Defendants.

Objections to Taxation of Costs.

Now come the defendants in the above-entitled action, and object and except to the taxation of each and every item of costs and disbursements set out in plaintiff's bill of costs and notice of taxation, for the reasons: (1) That no costs can be taxed against the United States; that the same law governs the sovereign as the citizen in the courts of law, and that therefore no costs can be taxed in favor of the United States against a citizen. (2) That proceedings in said action have been stayed for forty-two days after July 6, 1900, and no costs can be taxed until the expiration of said stay. Overruled.

Defendants further specifically object and except to the taxation of the item "attorney's docket fee trial March term, 1896, $20.00" for the reason that no jury trial of said action was had at said term; also, to the item of $139.50, for the travel of James R. Walker, for the trial at the March term, 1896, for the reason that defendants are not liable for traveling expenses outside of defendants' district; also to the items respectively of $15.00, $27.78 and $39.75, for hotel bill for the said Walker for the reason that said items are not proper items to be taxed against these defendants; also, to the item of $356.69 for reporter's fees for record, for the reason that said item is not a proper item to be taxed against defendants in this action. Overruled. Overruled.

Defendants further object and except to the taxation of any interest on any amount of said costs, for the reason that costs do not become due until taxed, and no interest is chargeable on them until taxation. Sustained.

Dated July 21, A. D. 1900.

(Signed) J. B. ATWATER,
Attorney for Defendants.

Indorsed: "Filed July 21st, 1900. Henry D. Lang, clerk."

82 Thereafter on the same day the following decision of the clerk upon the taxation of costs and objections thereto, was filed of record in said cause, to wit:

In the Circuit Court of the United States for the District of Minnesota, Third Division.

UNITED STATES OF AMERICA, Complainant,
vs.
PINE RIVER LOGGING & IMPROVEMENT COMPANY ET AL., Defendants.

Clerk's Decision upon the Taxation of the Bill of Costs and Objections Thereto.

The defendants object to the taxation of any costs and disbursements in this case,

1. Because no costs can be taxed against the United States; that the same law governs the sovereign as the citizen in courts of law, and that therefore no costs can be taxed in favor of the United States against a citizen.

I overrule this objection, if for no other reason, because it has been the uniform and settled practice of this court to tax and allow costs in favor of the United States in all cases heretofore to which it was a party and in which it was victorious. By long practice, hitherto undisturbed, it has become a custom to do this, and if it is wrong I think the court and not the clerk should point out the error.

2. That proceedings in this action have been stayed for forty-two days after July 6th, 1900, and no costs can be taxed until after the expiration of said stay.

I also overrule this objection. The practice in this court has heretofore been uniform, and is, I think, well settled that judgment is entered immediately upon the incoming of a verdict or the filing of a decision, and that the stay entered stays execution but does not stay the taxation of costs and perfecting of the judgment. Indeed, the usual and invariable form of the stay order specifically says that "execution and all proceedings except the taxation of costs and the entry of judgment therefor are stayed, etc."

Defendants specifically object to the taxation of,

1. Attorney's docket fee, trial March term, 1896, $20.00, for the reason that no jury trial of said action was had at said term. The fact is that at said term, on the trial, a jury was called and sworn, and thereupon a motion for judgment for the defendants on the pleadings was granted, resulting in a complete trial of the
83 case, with judgment for the defendants. The decisions are uniform, and I think it is established beyond question that the docket fee is taxable for each complete trial, and that the calling and swearing of a jury, and disposition of the case thereupon is such a trial as entitles the successful party to the docket fee.

The objection is overruled and the item allowed.

2. The items of $139.50, $15.00, $27.78 and $37.50 for travel and actual expenses of the witness James R. Walker are all allowed, and the objections thereto are overruled.

The witness Walker was an employé of the Government, and it is well settled that the Government employés called as witnesses are allowed fees for travel and actual expenses while in attendance on court as witnesses.

3. The objection to the item of $356.69 for reporter's fees for record, must, I think, be overruled, and the charge therefore allowed.

There are decisions in the State courts holding both ways on this question. I have been unable to find any decisions, nor have I been referred to any by counsel for either party in this cause—of the Federal courts in which the question has been squarely passed upon. In the absence of any such decision, the rules of this court and the decisions of the Minnesota supreme court must, I think, govern. Paragraph 3 of rule 31 of the rules of the U. S. circuit court of appeals for the eighth circuit is as follows: "The cost of the transcript of the record for the court below shall be taxable in that court as costs in the case."

The opinions of the court in 27 Minn. 280 *In re* Ovid Pinney and 51 Minn. 249, Linne *vs.* Forrestal are to the effect that the successful party in appeal proceedings is entitled to tax as costs the expense of preparing a "case" or bill of exceptions. The reporter's record of the trial in this case was obtained by the plaintiff for the purpose of preparing a "case" or settling a bill of exceptions, the plaintiff was the successful party on the appeal, and I think therefore the item must be allowed here.

Finally:

Interest is claimed by the plaintiff upon the items disbursed in this suit, which it is entitled to tax from the date of payment to the time of taxation. The defendants object to the allowance of any interest as claimed, and I think the objection is a good one.

It is fundamental that interest is allowable as damages for default in the performance of a contract to pay money; wherever a debtor knows that he is to pay and when he is to pay, he is chargeable with interest if he neglects or refuses to pay, or if he delays payment after due.

84 In this case, though the plaintiff disbursed many of the items in its bill long ago, it has only been determined very recently that it is entitled to recover costs, and the defendants certainly could not be expected to pay, nor could they have been advised what they are to pay until the costs are taxed.

No interest will be allowed.

Dated St. Paul, Minn., July 21st, A. D. 1900.

(Signed) HENRY D. LANG, *Clerk.*

Indorsed: Clerk's decision upon the taxation of the bill of costs & objections thereto. Filed July 21st, 1900. Henry D. Lang, clerk.

And on the same day the following notice of appeal was filed of record in said cause, to wit:

United States Circuit Court, District of Minnesota, Third Division.

UNITED STATES OF AMERICA, Plaintiff,
vs.
PINE RIVER LOGGING & IMPROVEMENT COMPANY, a Corporation; Joel B. Bassett and William L. Bassett, Copartners as J. B. Bassett & Company, and John S. Pillsbury and Charles A. Smith, Copartners as C. A. Smith & Company, Defendants.

Notice of Appeal.

SIR: You will please take notice that the defendants above named hereby appeal to the above-entitled court and the judge thereof from the taxation of costs made by the clerk of said court on July 21st, A. D. 1900, and from the taxation of each and every item of costs and disbursements so taxed by said clerk, for the general reasons set forth in defendants' objections to such taxation on file with said clerk; and also appeal for the specific reason set forth in said objections from the taxation of the following specific items of costs and disbursements, to wit: Attorney's docket fee, March term, 1896, $20.00; J. R. Walker's travel fee, $139.50, and hotel bills, $15.00, $27.78 and $39.75; reporter's fee for record, $356.69. Dated July 31, A. D. 1900.

(Signed) J. B. ATWATER,
Attorney for Defendants.

To John E. Stryker, Esq., attorney for plaintiff, and Henry D. Lang, Esq., clerk of said court.

Due service of within notice admitted this 30th day of July, 1900.
JOHN E. STRYKER,
Attorney for Plaintiff.
HENRY D. LANG,
Clerk of U. S. Circuit Court for the District of Minnesota.

85 Indorsed: Filed July 21st, 1900. Henry D. Lang, clerk.

And thereafter on the 22nd day of August, the following order sustaining clerk's taxation of costs was filed and entered of record in said cause, to wit:

United States Circuit Court, State of Minnesota, Third Division.

UNITED STATES OF AMERICA, Plaintiff,
vs.
PINE RIVER LOGGING & IMPROVEMENT COMPANY, a Corporation; Joel B. Bassett and William L. Bassett, Copartners as J. B. Bassett & Company, and John S. Pillsbury and Charles A. Smith, Copartners as C. A. Smith & Company, Defendants.

Order Sustaining Clerk's Taxation of Costs.

The above-entitled action duly coming on for hearing before the court on August 21st, A. D. 1900, upon the appeal of the defendants

herein from the clerk's taxation of costs, J. B. Atwater, Esq., appearing on behalf of the defendants in support of said appeal, and John E. Stryker, Esq., appearing on behalf of plaintiff in opposition thereto, and the court having heard and duly considered the matter,

It is ordered that said appeal be denied, and that the clerk's taxation of costs be in all things approved, and that defendants' several objections to said costs be and the same are hereby overruled, the defendants duly excepting to the overruling of each of their said objections to said taxation.

Dated August 21, A. D. 1900.

(Signed) CHARLES F. AMIDON, *Judge.*

Indorsed: "Filed August 22nd, 1900. Henry D. Lang, clerk."

Thereafter and on August 22nd, 1900, the following bill of exceptions was filed of record in said cause, to wit:

United States Circuit Court, District of Minnesota, Third Division.

UNITED STATES OF AMERICA, Plaintiff, vs. PINE RIVER LOGGING & IMPROVEMENT COMPANY, a Corporation; Joel B. Bassett and William L. Bassett, Copartners as J. B. Bassett & Company, and John S. Pillsbury and Charles A. Smith, Copartners as C. A. Smith & Company, Defendants.	Bill of Exceptions.

Be it remembered that this action came on for trial at a regular term of the United States circuit court for the district of Min-
86 nesota, held at St. Paul in said district on the 29th day of June, A. D. 1900, before Honorable Charles F. Amidon, judge of the United States district court, and a jury, and upon said trial the following proceedings were had:

John E. Stryker, Esq., special counsel, and Milton D. Purdy, assistant United States district attorney for the district of Minnesota, appeared on the part of the Government.

John B. Atwater, Esq., appeared for the defendants.

William H. Bennett, Esq., of counsel for defendants.

The jury is duly empanelled and sworn and the case on behalf of the Government is opened by Mr. Stryker.

JAMES R. WALKER, called as a witness for plaintiff, testified as follows:

I reside at Pine Ridge agency, South Dakota, and my occupation is that of an agent for the Government. I am a physician by profession. Since 1872, I have made botany a study, especially with reference to forestry and to the preservation of timber in forests, and also with reference to the effects of injury upon leaves, plants and trees. Since 1878, I have given my attention closely to the study of pine forests in the North and Northwest. I have studied them more especially with reference to injury done to them by forest fires. The

amount of injury that may be done by fire and that was necessary to cause death, and the time of death after injury: also, the condition of the pine forests, so far as I saw them in the State of Minnesota. I have also studied with reference to such signs of injury as may be observed by persons of ordinary occupation, in going through the forests, and such other signs as can be observed by persons examining them in a more systematic and particular manner, as to whether they would be destroyed by injury that had occurred to them, and more especially with reference to forestry and forests and the preservation of timber in the country.

From my experience, I think I am able to tell from an examination of trees which have been more or less injured, whether or not they are likely to be killed by that injury. My experience in the past has been that in the majority of cases I am able to tell whether the injury would result in death. In some instances, where the injury is close to the line of being vital, it would be, perhaps difficult; but after an ordinary fire, or injuries that occur ordinarily, I can tell, and most persons who are ordinarily acquainted with forestry can tell whether the injury will result in death. In the pine forests that I have seen in the Northern States, most of the trees show marks of fire; especially in the Norway pine the marks are very distinct and well marked. This is so in a very large per cent. of the pine,
87 and I think it is rather a rare exception in Norway pine trees not to have the marks of fire on them. The marks in some instances are quite extensive, and in some, rather small; but, in the majority of the Norway pine, there will be large spots at the lower part of the trees where the bark is burned away, and the wood is dead, while the remainder of the tree is living; and in some instances, these injuries appear to have been very late, and in others, quite old.

In the spring of 1892, I was at Leech lake, Minnesota, in charge of the Leech Lake Indian reservation. In the spring of 1892, I was ordered by the Commissioner of Indian Affairs to investigate certain cuttings that had been made on the reservation, and under these instructions I went and visited the various cuttings involved in this suit. I made two visits, and I think, in all, I visited about eleven or twelve camps. On my second trip, I visited the cutting at Leech Lake river, near Leech lake. My instructions directed me to investigate the timber, especially with reference to whether it was dead and down timber or living timber that had been cut. Proceeding on these lines, I found that a very large part of the logs on this landing had apparently been cut from green and growing timber. Some of it was indicated by the stumps and tops that seemed to indicate this; but the undergrowth at that cutting showed that if there had been a fire through there it had not been in very recent times, or any other injury that would destroy the trees. The underbrush clearly indicated that it was at that time green and living and vigorous, and a very large part of it was of several years' growth. A part of the underbrush was of the kind that is most easily affected by fires, such as birch and poplar. There was also a number of other kinds of undergrowth that showed several years of life of the

several kinds, being such as would be destroyed easily by fires that were not burning very strongly. I examined the character and color of the sap in these stumps and logs in a way sufficient to be convincing to me that the trees were in a good green and growing condition; after the manner that a person who was ordinarily in the habit of examining such matters for a preliminary investigation, passing by them without stopping to make a close and critical examination; yet, I was able to ascertain from examining the logs at that time with sufficient accuracy to ascertain as to the kind or character of the sap and to see it was that kind that comes from growing pine only. In a large percentage of both the stumps and logs at the landing, this character of sap was flowing. The sap that flows from a living pine tree has a greater consistency than in a tree that is injured so it will die, having more oil in it and resin and also being very much more consistent; the appearance being of a color, a light color, a light amber color; whereas, in a tree
88 that has been injured it immediately begins to lose the oil, and the wax or pitch begins to be granular in a manner that is very obvious after the tree is cut. The color of the wood also enables one to pass on the logs very soon after they are cut, there being a decided change in the color. The sap of the wood in a green and growing pine is a rich creamy white, whereas if it has been injured it first turns a chalky white and then becomes of a darker color. It enables an ordinary person to tell whether they have been vitally injured or not.

I then went to a landing or cutting a little farther down the same river, where the logs were at that time. The conditions there were very much the same as at the other. I think there was more dead timber there than there was at the first cutting; but a very large percentage of it was green and growing timber.

I went from there to the mouth of Leech Lake river, where it makes a junction with the Mississippi river. I found a very large amount of logs landed on the river bank at that place, and also found they were largely green and growing timber, and some dead timber too. The conditions there, where the logs were cut, appeared to indicate that there had been no recent fires to amount to anything. I found some tops of trees burned, but no spread of fire anywhere. There was not so much undergrowth there, but there was no evidence of fire of recent times having been about the place.

I went from there to Ball Club lake, to where the logs were landed on the westerly or southwesterly side of Ball Club lake. There I found very much that might be considered dead and down timber, because there had been a heavy blow-down there, and while the trees were not yet dead, they were probably in a condition where they would die after a while. There were probably some more trees actually dead, that were cut there; but there was a very large percentage of timber that was green and growing and evidently vigorous, that had been cut.

From there, I went to the northerly or northeasterly part of Ball Club lake. There, I found another landing of timber, in which

there was a very large percentage also of green and growing timber, some of the very finest white pine, with no fire mark upon it. I remember that at the present time most distinctly. But still, there was a number of dead trees there, a number that had been dead and down. But a very large percentage of it was timber that evidently from the appearance of the logs and tops where they were cut, was in vigorous growing condition when cut.

89 I then went to where the logs were cut and landed on the Mississippi river, between the mouth of Leech Lake river and Little Winnebigoshish lake. There were several landings, and there, I found the condition of the logs cut very much the same, as I remember it now, as at the previous landings; but there was a greater amount of dead timber, probably, here.

From there, I went to Cut Foot Sioux lake, and I think, there I found very much the same condition, quite a large cutting. There was some timber there that was injured, probably, by the wind, and there was some timber dead by fire; but a very large amount of it was green and growing timber, as indicated by all the signs I have spoken of in the other cutting.

In all these cuttings, I adopted the same methods of examination as I have earlier described.

I then went back to the agency, and this ended my second trip.

On my first trip, I examined the cutting on the northeasterly part of Leech lake, the logs being landed on the ice. In that cutting, I found the logs landed in very much the same condition as I found the others; but a great many more dead trees had been cut there than in most places that I have spoken of before. These dead logs were left in the cutting, some of them piled up and others left where they were cut.

From there, I went to the southerly, or southeasterly, part of Lake Winnebigoshish, where I found logs landed at different places on the ice. I found more evidence of fire there than at the other cuttings. The fires appeared to have been limited and to have started from fires set from tree tops that had been cut, evidently, the year previous to that; but still, a very large percentage of the logs had every indication of being alive and vigorous and growing when cut.

I then visited the camps at the easterly side of Lake Winnebigoshish, where the logs were landed at two or more places along the shore. I made the same examination as at other places, and found a large amount of green timber and some dead timber.

I then went to a camp near the outlet of Cass Lake river, where I found logs cut and landed on the banks of the river, that were apparently a very choice lot of green logs. In them were dead logs also, but a very small percentage. The logs and

90 stumps and tops and butts were evidently in a good and vigorous condition—good Norway and white pine. I found there a number of longer timbers, and these were, without exception, cut from trees that were apparently in a very good condition.

From there, I went to where the logs were landed, further up the river, and apparently cut from both sides of the river, and perhaps

from two camps. I thought there was a large amount of very good green and growing pine timber. The cutting that was landed at the Mississippi river had a much smaller amount of dead timber in it than the other landing. There were also longer timbers cut there, all of them green. Wherever I found the longer timbers cut, as I now remember it, they were all apparently of green trees, good, strong, vigorous, with every appearance of tree life in butt and sap. This completed my first trip.

During the two trips, I was employed in the examination of the trees, usually from daylight to dark, fourteen days altogether. From this examination, I was able to and did make an estimate of the percentages of dead timber and green and living timber in these cuttings. I can't state exactly what my estimate was, but it was between eighty and ninety per cent. of green timber.

Cross-examination:

I have practiced my profession as a physician since 1872. In 1872, I lived in Illinois, and from 1878 until 1885, I lived at Leech lake, and I went back there again in February, 1891. My legal vocation at Leech lake was that of a physician, and my vocation was the study of botany. I was employed by the Government as a physician and by the Smithsonian Institute as a botanist. During all this time, I was studying pine timber.

My first trip was in April, 1892, and the second trip in May. My first trip took seven days from the time I left the agency until I got back. I traveled in a sleigh over the ice and land. On the second trip I traveled in a canoe, and put in six days examining the logs. The entire trip took eleven or twelve days. The logs at the time of my examinations had not been removed from the landings.

WILLIAM A. MADDY, sworn on behalf of the plaintiff, testified as follows:

During the winter of 1891 to 1892, I was watchman of the Government reservoir dam at Lake Winnebigoshish. During the winter,
I visited a number of the cuttings of timber involved in
91 this suit. Part of my work was to meet the watchman from
Leech Lake dam every week and get his reports and forward them. On these trips, I would pass through the cutting of two camps. These were William Fairbanks' camp No. 1 and the other was Tuttle's camp, or Sid McDonald's. I was also up at Fairbanks' camp No. 2. The first two camps I visited practically once every week, and saw the cuttings.

At Fairbanks' camp No. 1, I should say that about 50 % was green and growing timber and the other 50 % was injured by windfalls or was dead. There had been no extensive fires through there within late years. Mostly white men were engaged in the cutting.

At Tuttle's camp, the percentage of green timber was about the same as at Fairbanks' camp No. 1.

At Fairbanks' camp No. 2, I saw them cutting some green timber, but I could not give an estimate as to the proportion. The greater

percentage of the men I saw working in these camps were white men and not Indians. There were twenty or thirty men in each cutting.

Cross-examination:

At Fairbanks' camp No. 1, there had been fires through there some time before.

At Tuttle's camp, there had been a fire in May or June, 1891. I don't know about previous fires, because I wasn't there. I did not make a careful examination, but as I passed along, I thought about 50 per cent. had been burned by fire.

HENRY F. BURING, sworn as a witness for plaintiff, testified as follows:

My business is working in the woods, and I have worked in the woods about sixteen years.

During the winter of 1891–'2, I was foreman of Fairbanks' camp No. 1 for about three months, starting about the first of December and ending in March. Our crew consisted of about twenty-two men, as an average. At times, they were mostly Indians, and at other times, mostly white men. I started in with white men. I began cutting south of the camp, and began cutting dead timber. After that, later on in the season, we cut to the east. The timber there was some down and some was standing and green. There had been a fire through there, but not shortly before we cut there. I should judge about 50 % of the logs cut at this camp during the season were green. We put in something over 800,000 feet. Arno
92 Mereen was at the camp probably four or five times during the winter. He was looking after the cutting for the Pine River Logging & Improvement Company. Henry McAlister was there once or twice. I do not know what he was doing. He never stayed there over night, and never went through the woods. Mr. Tristram W. Tidd was also up there. He was there as inspector for the Government. He directed what timber should be cut. He objected once to the timber we were cutting there.

We then moved to another place. He designated the place where we moved to. I couldn't see any difference in the character of the trees at the two places, as to there being more or less dead timber, where we went after we moved. He didn't give any reason for making us move. We were cutting on the river bank when he stopped me, and he moved us up the river probably half a mile. In both cases, the timber was on the bank. Mr. Tidd did not make any statement as to the amount of dead timber we could cut there. We cut all the timber there was there. After we had done cutting all the timber we could, he spoke to me of going north of Winnebigoshish dam. He pointed out the place where he wanted me to go. The timber that he showed me was white pine. There was some dead, but it was principally standing green timber. He told me I could cut 300,000 feet there. I went over and looked and estimated that there was not more than 80,000 feet of dead timber that could be cut there. I don't think more could have been cut there.

Cross-examination:

I was foreman of Fairbanks' camp No. 1. Mr. Mereen was there, looking after the length of the timber being cut, certain lengths that he wanted. Mr. Fairbanks was my father-in-law, and I was his foreman. He was an Indian. I seen Mr. Tidd at the cutting once or twice. Mr. Tidd was about there several times. He was looking after what timber should be cut. I saw him quite frequently at Fairbanks' house, which was a little north of this cutting. This place where Mr. Tidd spoke to me about cutting white pine was across the river from Fairbanks' house, north of the dam. Mr. Tidd told me to go there and look it over and report. When I came back, he asked me how much I could cut there, and I told him I could cut about 80,000 feet of the dead and down timber, and he told me that if I would move he would guarantee 300,000 feet. I thought I could get about 80,000 feet. I did not move my camp over there, and did not cut any of this timber. At this camp No. 1, a fire had been through there. When I speak of the timber being green, I mean that the trees had green tops. Where
93 trees have been burned, people may differ as to whether they will go on and grow. I don't think any of the trees were burned more than six or eight feet up. Sometimes we had more Indians and sometimes less. We couldn't depend on the Indians, always. When we had work, we always gave the Indians employment.

Redirect examination:

I do not think that a tree can be alive—what we call a green tree—and not have a green top. A tree that has a green top is necessarily a green tree, that is, when it is standing timber. We cut off the butt end of some of these logs—a very few of them—white pine that would be burned in the heart. My judgment at the time was that this 50% of green trees was injured enough so that they would have probably died in two or three years. I refer now to my estimate of 50% of green timber. All the trees were injured, more or less. This last statement would apply to very near all these trees. I would make a few exceptions, but, as a general rule, it would.

Mo-si-mo, sworn as a witness on behalf of the plaintiff, testified as follows:

I live on the Winnebigoshish Indian reservation. I have always lived there. I am and was in 1891 a chief of the Chippewa tribe of Indians. I know about the logging camp which Sho-cag-e-sic had near the shore of Cut Foot Sioux lake in the winter of 1891–'2. I was familiar with the timber around that camp as it was before it was cut that winter. It was principally Norway pine and was living timber. There had been no fire in there in recent years. I never saw any fire run through there. Some distance away from there, there had been fires in previous years, but not where this logging was done. There were a few blown-down trees in there. About

two-thirds were green timber. I did not live very close to where the cutting was being done, but I went around there to find out what kind of timber they were cutting. I stayed around there all winter.

Plaintiff then introduced in evidence, without objection, certified copies of the five logging contracts referred to in the pleadings in this action, true and correct copies of which are attached as exhibits to the answers of J. B. Bassett & Company and The Pine River Logging & Improvement Company in this action. Plaintiff's counsel then read in evidence Plaintiff's Ex. B, a copy of which is hereto attached.

JAMES DRUMBEATER, sworn as a witness on behalf of the plaintiff, testified as follows:

94 I was at Ball Club lake in the winter of 1891–'2. I lived at White Oak Point. I did some logging there that winter. The circumstances under which I did the logging were that while I was living at White Oak Point there was a man sent to me to meet a certain party, in order to make arrangements to go in partnership and do some logging. I met that man that day. We made arrangements just how we were to conduct this logging, and how we were to divide the profits, if any. Shortly after we arrived at Little White Oak, where we were to log, the men and teams had arrived that were to begin the work connected with the logging, and then we started right in logging at once. The man that I made arrangements with was George Lydick. I don't know anything about any permission or authority that Lydick or I had to cut these logs. I did not have any permission myself. I was not paid for my work at the logging camp. I understood we were to go in there and cut some dry timber and we only cut dry timber about a week, and also took out timber that the Indians had cut down before. The foreman refused to accept the timber that was dead and down, and he accordingly instructed the men to cut the standing timber. They started in cutting the green and standing timber. They cut it all during the whole logging season. The trees were white pine and Norway pine, and were mostly all very large trees. There were less Norway pine than white pine. Out of ten trees that were cut, there was about one dry tree. The white pine was cut from the low, swampy lands, and the Norway on the high lands. There were no fires where the white pine was, and it was not injured in any way. The bark on the Norway was burned black, but aside from these black marks, I don't know of any reason why this timber should be considered injured. Lydick came into our camp every now and then during the winter, but he stopped in his Winnebigoshish camp. I had no control over the white men that were at work in that camp. I had a little something to say to the Indians; I showed them what I wanted them to do. About six Indians worked all the winter, and there were from eight to ten white men employed.

Cross-examination:

At one point, there had been a fire through the Norway trees, and the bark on the trees was burned up to the height of a man. The first timber that we hauled was some that had been cut down by the Indians. There was quite a lot of that timber, although the timber was not all accepted. Some of the logs were too dry. I worked at the camp about three months, and until the snow went off in the spring. Lydick was up to the camp quite frequently. I saw
95 Mr. Tidd at our camp twice. I saw him frequently at Deer river. I-Ah-bance had nothing to do with that cutting and was not in that camp during the winter.

I-Ah-Bance, sworn as a witness for the plaintiff, testified as follows:

In the winter of 1891–'2, I lived on the reservation on Winnebigoshish lake. I had something to do with cutting logs that winter at the forks of Cass Lake river and another stream between Cass Lake river and Winnebigoshish lake. This was about 30 miles from Drumbeater's camp and I was not in his camp that winter. I was logging with Lydick. The understanding was that I was to be the owner of the camp, and I was to realize more than he from the proceeds of the logging. Lydick and I were partners in that camp. I used William Fairbanks' permit to log that winter. He did not hire me to log for him. He did not pay me anything for that work. I selected a place for the camp to be located, where there was lots of dry timber, and that is where we located. They only cut a few trees, a little of the dry timber, and then they commenced to cut the green timber, and I forbid them to do it; but they did not stop. They then cut green timber. This was up the river from our camp, and it was white pine. There never had been any fire in the woods by the river before the cutting, to my knowledge. There might have been some a long time before I was born. I had no control of the men in the camp. I had nothing to say, at all, about hiring the men. I wanted to hire Indians, but my partner told me Indians were too lazy. My partner told me he would hire some white men that would do the work and make us some money. There were about eighty men working at the camp, altogether. Sometimes there were ten, and sometimes there were more Indians. The number got smaller and smaller towards the end of the logging season. Barney Doland had charge of the camp and gave the orders. I helped make roads and haul, and worked at the stables. I did not do this work of my own accord, but was told to do the work. I thought I would get pay for it, so I thought I would obey the orders that were given to me. After we started in logging, I didn't seem to own anything in the camp.

Q. Were you paid by the owner, did you get any profit out of the work that winter?

Objected to by defendants as immaterial, incompetent and irrelevant.

A. No, sir; I did not.

96 The witness then testified that of every ten trees cut during the winter there were eight green trees to two dry trees.

Cross-examination:

I began to cut about the middle of December. I heard the Indians talking about it, that permission had been given to certain parties to log that winter, and I desired to do some cutting myself. William Fairbanks told me about it. He is my brother-in-law. He told me that I could cut under his contract. I know Mr. Tidd, the superintendent of logging. I saw him around the reservation that year. He came to the camp, and was inside of the camp, but didn't go anywhere else. My understanding of green timber is that any tree that has green boughs I consider a green tree. I call a dry tree one that has no green limbs or boughs. There was some timber around there that was injured by fire, but not anywhere near where we were cutting. There was no fire in the timber near the river that we were cutting.

Redirect examination:

There had been a fire through the timber where we first started to cut. There had been no fire in the timber down by the river where we did the cutting later. Lydick was not up there when I selected the location for the camp. I was all alone when I went and selected a place for logging. After this, Lydick came to me and we had the understanding, and then we erected a camp and commenced logging.

Recross-examination:

I am not very friendly towards Lydick since he robbed me of everything he agreed to give me that winter after we had logged; but when I meet him I am friendly towards him. I have never heard that if the United States wins this suit we would be paid for our logs again; but I would be very glad if they would win that suit, so we could get the full value of our logs.

EDWARD L. WARREN, sworn as a witness on behalf of the plaintiff, testified as follows:

I have lived at Detroit, Minnesota, for fourteen or fifteen years, and during that time have been a deputy United States marshal. I have worked in the woods, and have been engaged in the logging and lumber business, off and on, for twenty years.

In March, 1892, I went up to the Winnebigoshish reservation with Mr. Tallman, another deputy United States marshal, to
97 investigate some charges in regard to the selling of liquor to Indians who were engaged in logging for Smith and Bassett. As I understood it, Smith and Bassett had made a report that liquor was being taken into their logging camps and making some disturbance, and we were ordered out there to investigate it. On this

trip, we started from Deer river and went to Lydick's camp at White Oak point, and from there to Charles Losh's camp at Ball Club lake, and from there to Fairbanks' camps Nos. 1 and 2. On our way back, we went to Sho-cag-e-sic's camp. At Lydick's camp, we went along the logging road and drove down to the landing. They were cutting everything there was there. We went up into the cuttings. There were green trees on the landing. There were some green logs and some dead logs They had the appearance of being green. The most of the logs were white pine. At the Losh camp, there was some dead timber there and some green. There was not as much green timber cutting as there was at Lydick's camp. There appeared to be on the landing a great deal more dead timber than there was at Lydick's landing. There had been some fire in there. The timber was mostly Norway.

We then went to Fairbanks' camp No. 1, drove through the cutting and went down to the landing. The character of the trees being cut was about the same as at the Losh camp. There were some green logs among those at the landing—had the appearance of green logs. I did not make a sufficiently careful examination to give the percentage of green timber.

I then went to Fairbanks' camp No. 2. Tallman and I walked up the logging road and looked at the logs being cut there, and I should judge that the timber was very much greener there than it was in the Fairbanks and Losh's works, from the appearance of the cutting. I couldn't tell what proportion of them were green timber. I examined the logs, and a large proportion of them were green; but I wouldn't give the percentage. By a large proportion, I don't mean exactly 50% nor 60% nor 40%, but somewhere around there.

We then went to Sho-cag-e-sic's camp on Cut Foot Sioux lake. They were cutting green timber when we got there, right on the shore of the lake. We saw the trees falling. We saw the logs on the landing. They were green logs. We were at this camp perhaps twenty minutes or half an hour. Mr. Galbraith was in charge of this camp. He was there on the landing, and told me he had charge of the camp. I had some conversation with him at that time with reference to these trees that they were cutting.

Q. What was the conversation?

98 Objected to by defendants as incompetent and immaterial.

The COURT: I think I will allow the question as part of *res gestæ*. Defendants duly excepted.

A. I said to Mr. Galbraith that they were cutting—I says, "You are cutting green timber here." He says, "I know it." And I says, "You will get in trouble if you ain't careful." He says, "There is others cutting." He says, "I don't see any reason why I shouldn't cut some." I think those were the words.

The witness further testified that upon his return he reported this matter of the green timber cutting to Maj. Schuler, the United States Indian agent. At Sho-cag-e-sic's camp, the logs were covered

with snow, except those that had been hauled that morning. I could not tell what the character of the other logs was. The logs hauled that morning and those that were cut in my presence were green logs, and the conversation with Galbraith was in regard to these logs.

Cross-examination:

We left Deer river in the morning, and stopped for dinner at Losh's camp, and spent the night at Fairbanks' camp No. 2. That night, there was a heavy fall of snow, so that the crew could not work the next day, and we spent that day at the camp. We went to Sho-cag-e-sic's camp the following day. We passed through these cuttings on the logging roads, but did not get out of the sleigh in the woods at all. When fire runs through a tract of timber, the most serious injury is the burning at the roots. The most of my observation was on the logs at the landings, and such of the cuttings as I could see driving along the road. An inspection of the logs on the landing would not show whether they were cut from green standing trees or from trees recently blown down. At some of the camps there were considerable blown-down trees. My visit was about the ending of the cutting season. I suppose the camps were about ready to break up. As soon as I returned, I wrote to Maj. Schuler, the Indian agent, and told him they were cutting green trees.

CHARLES WOOD, sworn on behalf of the plaintiff, testified as follows:

In the winter of 1891-'2, I was working as foreman for John Bonga. At that time, I had worked about thirty years in the woods. His camp was just below Six Mile lake. We had three cuttings there, one around the camp, the second down the brook some distance, and the third farther down on Leech Lake
99 river. At the first cutting, about 90% of the timber we cut was dead and down. At the second cutting, it was half standing dead and half green. At the third cutting, the character of the timber cut was green timber. There had been a fire through there. It had burned the trees all the way from six inches up to six feet. The effect would be to kill the trees in time. The fire had burned into the bark. The tops of the trees were green. About thirty men were employed there. On the start, about eighteen were Indians and four white men. Later in the season, they were pretty much white men. Henry McAllister was in our camp in the winter. He was looking after the furnishing of teams, sleds, and whatever we needed. Arno Mereen was there looking after the cutting, the lengths of the logs. William L. Bassett was there once. He didn't do anything there, and I don't know what he came for. He was there about an hour. When I saw him, he was on the logging road where we had been cutting this timber. The total amount of timber cut at the three cuttings was something over a million feet. About 40,000 feet was cut at the second cut-

ting and about 300,000 at the third cutting. This last cuting was all green.

Cross-examination:

On the first trial, I testified that all the timber at the second cutting was damaged by fire. I know Mr. Tidd and he was around the reservation that winter. He was looking after the timber. He was at my camp, and directed as to what timber should be cut. All that McAllister did was to find out whether we wanted any teams and supplies. All that Mr. Mereen did was to see that the logs were the proper length and were properly marked. Neither of these men directed what timber should be cut or interfered with me in any way.

There had been fires through the timber at the third cutting. It had burned the trees from six inches up to six feet. That timber was used for boom sticks.

Redirect examination:

I remember that McAllister was there two times. Mereen was there two or three times. Mereen was out in the third cutting, I believe. He stayed over night at the camp.

McAllister did not stay over night, and did not go out into the cutting.

WILLIAM FAIRBANKS, sworn on behalf plaintiff, testified as follows:

I have lived at Winnebigoshish for over thirty years. In the winter of 1891–'2, I had a logging contract with the Pine River Logging & Improvement Company. I think Bassett and McAllister came up there and made a contract. I don't know who first told me there was to be logging on the reservation that winter.

I had three camps that winter. Camp No. 1 was about two and a half miles north of Lake Winnebigoshish. Camp No. 2 was on the south side of the lake, about three miles and a half from the dam. Camp No. 3 was at the mouth of Cass river, where it empties into the lake.

I had no interest in any other camps there that winter. I did not hire any one to log anywhere else except at these three camps. I gave them a permit to log under my contract. I gave I-ah-bance a permit to log under my contract. His cutting was on the Cass river, above my first camp. I did not give permits to any one else. I did not furnish laborers or supplies or money to run any camps except those three. Lydick was with I-ah-bance in running his camp. I did not employ Lydick to log for me and did not pay him anything for working there that winter. I did not receive any of the logs that he cut, nor pay for any of them, nor receive pay for any of them. This is also true of the logs which I-ah-bance cut.

I did not go out much into the camps during the winter. I know what kind of trees they cut through my camp. I never go around

where they were cutting. I go through the woods. I think they cut green timber. At the beginning of the season, they cut dead and down timber. I can't tell exactly the time when they began to cut green trees. I gave my man very particular orders about it, to not cut green timber at all. My man told me they were cutting green timber all over the camps, and I went to Lydick's camp to see what kind of timber they were cutting there, and I found they were cutting green timber there. I went twice. When I came back to my camp, I told my men to cut the same. I can't tell what percentage of the trees cut there were green. I don't write myself. I had a book-keeper there, Albert Niederer, who was authorized to sign my name. He was the only one on the reservation authorized to sign my name.

I saw Henry McAllister and Arno Mereen out through my camps that winter. Mr. Tidd was up there. He was looking around the camps after the cutting. I did not see him on any of the timber where they were cutting.

Cross-examination:

I don't know but I think that I first heard through Mr. Schuler, the Indian agent, that the Indians were to be allowed to cut timber that winter. I made application to him for a permit. Afterwards, McAllister came up to me to make a contract. Then, afterwards I had a talk with Lydick and I-ah-bance, as to cutting
101 under my contract. I was not in the camps much during the winter, and did not take any active part in the cutting.

I think I can tell green timber from dry timber. Green timber has green boughs. Dry trees have no green limbs; the boughs are all dead.

Mr. McAllister was simply looking after the supplies. Mr. Mereen was looking after the marking of the logs and the proper lengths. I don't think they ever interfered with what kind of trees should be cut.

Mr. Tidd was around the reservation that winter, directing what trees should be cut and overseeing the cutting. I had cut timber on the reservation before. At the time I spoke to Mr. Schuler about getting the permit, I knew there was a large amount of dead and down timber in some places.

JOHN LYONS, sworn on behalf of the plaintiff, testified as follows: I live at Ball Club lake, on the reservation. In the winter of 1891–'2, I was cutting some logs on the reservation. In the first place, I went right on there on my own hook. I was there the winter before, in the start, and had a camp there. I saw the rest of them were going logging there, and I started in and went to logging; but finally, I went to working under Fairbanks' contract. Mr. Tidd came to me and told me that I couldn't do any logging there unless I had a contract by working under somebody else's contract. It was too late; I couldn't get one of my own; so I had to go under some other man's contract. I did not see Mr. Fairbanks

before I began to work under his contract. Mr. Tidd came to me and told me I could go under Losh's contract, or Fairbanks'. He says, "You can suit yourself," so I preferred to take Fairbanks' contract. I did not see Mr. Fairbanks about it at all. Mr. Tidd told me to go right to work, it was all right. I had started in to cut before this arrangement with Mr. Tidd. Fairbanks had no control over my camp, did not furnish any supplies or hire any men. He was at the camp once or twice, but not on any business. The settlement for the work at the end of the season was made with me and my partner, and not with Mr. Fairbanks. My partner was Jim Wakefield, who is now dead. Our camps were first located about two or three miles below the Winnebigoshish dam. Towards spring, I went over on Cass river. I changed the camp because I was stopped by the overseer, Mr. Tidd. He said I was cutting too green timber. I had no more dead timber there. After the change, I should judge we cut about the same green timber as before. Mr. Tidd did not make any objection to it.

102 Mr. Tidd was never in the woods with me but once. He drove in there after the logging road was cut, before it was broke out, and we just went to the edge of the timber, and he showed me the kind of trees we could cut at the present time. He says, "After the road is broke out, we will come in again," but he never went back there again. On his other visits to the camp, the only inspection he made was to look over the logs at the landing.

I saw Mr. C. A. Smith at the camp once, and Mr. Wm. L. Bassett was there. The camp they visited was the lower camp, the Winnebigoshish camp.

Mr. Arno Mereen was at the camps very often and Henry McAllister was there. Mr. Mereen was there to see if the logs were marked right. That is about all that I could learn he was doing. McAllister was there to see whenever they got out of supplies, teams and one thing and another. Whenever we wanted any more supplies, he was there to get them for us.

At the time I went to work under the Fairbanks contract I knew what the terms of the contract were. I did not know how many logs Fairbanks was authorized to cut. I never saw his contract. All I know about it is what Mr. Tidd told me.

Cross-examination:

The first time Mr. Tidd was at my camp, he told me that I could not cut on my own hook, and the only way was to cut under one of these contracts. I had no understanding at all, at the time, with Mr. Fairbanks; my talk was with Mr. Tidd only. I paid Mr. Fairbanks something like $40 or $50 along the next summer, for cutting under his contract. The agreement I made with Mr. Tidd was that I was to go on under Fairbanks' contract, without paying anything for the use of the contract. Next spring, Mr. Fairbanks said Mr. Tidd told him I should pay him for cutting under that contract; and I did pay him. I understood all the winter that I was working under the Fairbanks contract. The settlement of which I have

spoken was at the White Earth agency, after the logs had all been cut. I was there and Fairbanks was there, and Mr. Smith.

I had worked at logging on the reservation before this winter. I am one of the Indians on the reservation.

Mr. Tidd stopped the cutting at the first camp on the ground that we were cutting green timber. He told me there was some dead timber over on Cass river, and told me to go over there and look and see if I could find anything. He told me I could go and cut dead timber there. Mr. Tidd was around the reservation
103 and at these camps during the winter. Neither Mr. McAllister nor Mr. Mereen nor Mr. Smith nor Mr. Bassett ever directed me what timber to cut, or interfered with me in any way.

What I call green timber is timber that has got green boughs and is growing. I understand by dead timber, timber that has got no green boughs on and is dry.

CHARLES C. WALKER, sworn on behalf of plaintiff, testified as follows:

In the spring of 1892, I was working on the reservation for Clark Clay. We cut about seventy-five green and healthy trees which were not injured in any way, to make a float and head works. The trees were Norway trees, and the logs we cut were from thirty-eight to forty-five feet long.

These trees were cut near Tuttle's works at the south end of Lake Winnebigoshish. The last I saw of the float and head works was, we left them above the Winnebigoshish dam. They were used for getting the logs across the lake.

Cross-examination:

There were no log marks on these logs.

Plaintiff then offered in evidence a certain contract for the driving of the logs in controversy between Clark Clay and J. B. Bassett & Company, and the Pine River Logging & Improvement Company, a copy of which is hereto annexed, marked Ex. C.

PAUL BONGA, sworn on behalf of the plaintiff, testified as follows:

I live at Leech lake. In the winter of 1891–'92, I was working in the woods at Peter Bonga's camp. This was at the north end of Leech lake. I saw Mr. Tidd at the camp, and heard him give direction to Mr. Bonga as to what kind of trees they were to cut. He pointed out three trees near the camp and says, "Such as them you will cut." These trees were live trees, green timber, and had not been burned or injured at all.

The logs cut at that camp were about half Norway and half white pine.

There had not been any fires through that country.

The trees that were cut there that winter were all standing green trees. There were a few dead trees among them.

Cross-examination:

Mr. Tidd did not use the words "green timber." All he did was to point out certain trees and tell Bonga that he should cut
101 trees like that. In my opinion, the trees he pointed out were green timber. I understand by "green timber," that it has green boughs. In the dead timber, the boughs are dead.

There had been some fires through other parts of the cutting.

Redirect examination:

I do not know how long ago these fires had occurred. They looked as though they had been the year before. Where the fire was, was on the north part of the camp.

The trees that Mr. Tidd first pointed out were not near there. After pointing out these first trees, he turned over to his left—there was a bunch of green timber standing there—and he said, "Such as them, also you can cut." One of these bunches he pointed out had been burned some, and the other of them had not been burned at all.

Recross-examination:

The first three trees he pointed out were, in my opinion, green timber. They had some dry branches on them.

J. O. WARRINER, sworn on behalf of plaintiff, testified as follows:

In the spring of 1892, I was a special agent of the United States General Land Office. About April 7, 1892, I received instructions from the Commissioner of the General Land Office to investigate the cuttings here in dispute, and at that time went to the reservation and made some examination of the cuttings and the logs. I made a report to the Commissioner, and about May 14th, returned to the reservation and, pursuant to instructions, seized and took possession of all the logs in controversy on behalf of the United States.

I returned to the reservation about June 1st, and spent the most of the time from then until some time in December in making an examination as to the character and amount of the timber cut at all these various cuttings, involved in this case, and in making a scale from the stumps and tops as to the amount of timber cut. Mr. Le Roy Wheaton was with me nearly all the time, and my son was with me for most of the time, and in October and November I had Mr. Niederer with me. I provided myself with a book in which to keep a record of my investigations, and a Scribner rule and a 100-foot tape-line. I made a detailed examination and scale in the same way such examinations and scales are usually made.

As to the character of the timber, I divided it into three classes:
First, that which I considered unquestionably dead, or blown
105 down; second, that which was stump-burned, but which might possibly be considered dead timber; and third, that which was unquestionably green timber. If the bark was loose, or if the stump was burned—half or two-thirds of it—I would class those as dead trees, without any regard to the top. I put in the stump-

burned class, trees that had been burned more or less at the stump, that had the appearance of tight bark, the bark being tight around the stump, and the pitch which exuded around the stump being stringy, thin, and the sap of the wood white, without any discoloration.

The witness further testified that during the time above specified he visited all the cuttings here in controversy, with his assistants, examined the character of the timber cut—as to being green or dead and down—and classified it in the three classes, as above stated, and made a scale of the amount of timber cut, and that the results of such classification and scaling as to each camp and each cutting were correctly set forth in Plaintiff's Ex. D, which was introduced in evidence in connection with his testimony, and a correct copy of which is hereto attached.

Cross-examination:

The witness testified, on cross-examination, that his business, prior to 1890, had been that of a watchmaker and optician; that he had done some scaling when about eighteen or twenty years old, but had never been an official scaler; that this was the only scaling he had done prior to 1892, except for himself on his own land; that in the summer of 1891, he had made an examination of some timber in upper Michigan, to determine whether it was burned by fire or not sufficiently to be injured; that, other than this, he had not done any scaling or examination of timber prior to 1892 to determine how seriously it was burned; that the question as to whether, when a fire has passed through a tract of timber, the timber is sufficiently injured so that it will die within a certain period or not is a matter of judgment and discretion as to which experts may differ and often do differ; that the fires had run more or less through most of the cuttings except the White Oak Lake cutting and where some boom sticks were cut.

Redirect examination:

I think that, generally, through the woods there there had been fire through the pine cutting at some date. This is generally found
106 in all pine forests. I don't remember having visited any considerable portion of pine but what had more or less evidence of fire.

LEROY WHEATON, sworn on behalf of plaintiff, testified as follows: I have logged in the woods for about twenty-six or twenty-seven years. My business has been from two to five hundred thousand feet per year, right along. I have had some experience in scaling and estimating timber. I am familiar with the effect of fire upon pine trees. Generally, all Norway pine is burned, more or less. The trees may have scars, and still be green; but, if burned badly about the roots, in some cases it kills the pine. It is customary to find substantial marks of fire on all healthy forests. I have never seen any large tract of pine without showing more or less signs of fire. In

most cases it is possible to tell when trees are burned whether they will be killed by the burning or not. I think I can tell when I examine a tree. When a fire has run through a tract of pine, it blackens the bark and sometimes it burns into the wood some. Sometimes it runs clean to the top and burns boughs and the bark. The roots are the most serious part of a tree to have burned. If the boughs are burned bad, the tree sometimes dies. If the fire runs up on a Norway pine some six or eight feet, it will live sometimes, if it doesn't burn the roots very bad, or the boughs. Mere blackening of the bark, if the roots are not destroyed, or tops burned, is not serious. It is common to find in forests trees burned ¼ or ½ through the trunk, and still living. I am familiar with trees that have lived a good many years, that were burned half or a quarter way through the trunk. Where trees have been more or less badly burned, but the sap is not discolored and the boughs are green, I should call them alive, particularly if considerable time had elapsed since the fire. If the sap is of good color and flows from the stump freely, I should call that a green tree. Where the tree is badly burned, the sap does not flow, and is thicker and of a darker color, and the inner bark is a darker color. White pine is more readily injured by fire than Norway. It is possible to tell how serious a fire has been by examination of the underbrush and the condition of the soil where the fire has been. I took into account all signs of this kind in the examination which I made with Mr. Warriner.

The witness then testified that he was employed by Mr. Warriner in making the examination of the cuttings testified to by the latter witness, and was engaged in that work for about four months in examining the ground and stumps and tops of the trees from
107 which the logs involved in this case were removed, and that the classification of trees as dead, stump-burned and green and the scalings made by Mr. Warriner were correct and accurate.

The testimony of L. C. WARRINER given at a previous trial of this case, was then read to the jury, the witness having died since said trial. The witness testified that from the first of August to the first of December, 1892, he assisted his father, J. O. Warriner, in making the examination and scale of the timber testified to by the latter witness, and that so far as the said L. C. Warriner assisted in it, the classification of the trees and the scale of the timber was correctly made.

ALBERT NIEDERER, sworn on behalf of the plaintiff, testified as follows:

During the winter of 1891–'2, I was clerk and book-keeper for William Fairbanks. He could not sign his name, and authorized me to sign his name to all checks. He ran three camps there that winter. Camp No. 1 was about two miles from his place; camp No. 2 was at Lake Winnebigoshish; and camp No. 3 was at Cass Lake river. I kept accounts for these three camps. I had nothing to do with the accounts of either Lydick's camp or Lyons and Wakefield's camp. I went into camp No. 1 once early in the

winter and once early in March. The first time I went there, the timber was pretty dead. The second time, it was equally divided between green and dry.

(The witness was then shown eighty-six time-checks.)

None of these time-checks was signed by me except one check drawn on March 31st.

Plaintiff then offered in evidence these time-checks as Exhibits E 1 to 86, a correct copy of one of which is hereto annexed. The other checks were similar in form to the above, but differing in dates, amounts, etc., but all came from George Lydick's camp, and were signed "I-ah-bance & Company, George Lydick, foreman" and purported to be endorsed "William Fairbanks, his mark."

Cross-examination:

My business was chiefly in Fairbanks' store. I was in the woods only once or twice.

I understand by "green timber," trees with green tops, where the sap is not entirely destroyed. I think this green timber was burned two or three feet high up. I have never been a lumberman.

CHARLES A. SMITH, called as an adverse witness by the plaintiff, under the statutes of Minnesota, testified as follows:

108 I am one of the defendants in this case, and was the secretary of the Pine River Logging & Improvement Company, and a member of the firm of C. A. Smith & Co.

During the logging season of 1891–'2, the defendants established a logging supply bureau at Deer river, and Mr. Meldahl had charge of it, representing the defendants. The logs cut under these five contracts were divided equally between C. A. Smith & Company, and J. B. Bassett & Company. The Pine River Logging & Improvement Company was practically controlled by C. A. Smith & Company. The defendants employed Henry McAllister and Arno Mereen in the various camps during that winter. The log mark **CAS**, which was used on a large number of these logs, was the property of C. A. Smith & Company prior to these logging operations. The mark **E** girdle **B** was put on all the long logs cut in all these cuttings.

I was up at the reservation that winter twice. I did not visit the cuttings, but visited the most of the landings and camps, but not all of them. In visiting the landings and camps, I went through some of the cuttings. I did not go off the road. We were driving through. The first time I went up there was in January. The second time I went up was in March; but then I only visited one cutting at White Oak point. On my first trip I visited most of the landings, but not all. On that trip, I was on the reservation three days. I signed the Clark Clay contract in evidence for driving these logs. The logs were driven under this contract, and the defendants received them.

HEALEY C. AKELEY, sworn as a witness for plaintiff, testified as follows:

I live at Minneapolis, and have been engaged in the lumber business there for thirteen years. I was engaged in the lumber business about thirteen years before I came to Minneapolis. In the years 1891 and 1892, I was engaged in buying and selling pine logs and was familiar with the value of logs at Minneapolis and around the headwaters of the Mississippi river. In my opinion, the value per thousand feet of pine saw-logs of an average quality, average length, seven or eight logs to the thousand—a mixed lot of logs, say 15% white pine and the rest Norway—at the Winnebigoshish dam in the spring of 1892, was $5.50. If the logs had all been white pine, they would have been worth $7.00. If they had been all Norway, they would have been worth from $4.50 to $5.00.

LEROY WHEATON, recalled on the part of the plaintiff, testified as follows:

109 I saw some of the logs here in controversy. I saw them on the ice at White Oak lake, at Little Winnebigoshish, at Ball Club lake and at Winnebigoshish dam. I also saw some at Lyons and Wakefield's camp, below Little Winnebigoshish. I should say these logs were a good common, good fair average quality of logs. They were about 15 % white pine and the balance Norway. They were good average size—fair size. There was a considerable number of long sticks. In some places merchantable timber was left in the cuttings.

(It was admitted by the defendants that the logs would run from seven to eight logs per thousand feet.) The value of such logs in the vicinity of the Winnebigoshish dam was from $5.00 to $5.50 per thousand feet in May 1892.

Plaintiff then rested.

Defendants then moved the court that the plaintiff elect as to the time and place of the conversation upon which it relied.

Plaintiff thereupon elected to take the value of the logs in the spring of 1892 as they were at the time of the seizure in the vicinity of Winnebigoshish dam.

The case on the part of the defendants was then opened to the jury by Mr. Atwater.

Defendants then introduced in evidence seventeen scale bills, which showed the bank scale of the logs in controversy made by the surveyor general of the second lumber district of Minnesota, during the winter of 1891–'2. The total number of feet shown by said scale bills was 17,600,260 feet. The number of logs shown by said bills showed an average of about seven or eight logs to the thousand feet.

Defendants then offered in evidence certified copies of scale bills from the office of said surveyor general, showing the boom scale of the logs in controversy at Minneapolis and other points along the Mississippi river. Said scale bills were brought down to July 3rd, 1900, and showed a total scale up to that time of the logs marked

with the log marks described in the pleadings, amounting t 17,030,030.

LEWIS W. BROWN, sworn on behalf of the defendants, testified a follows:

I have been in the lumbering business in Minnesota since 1854 In 1892, I was working for C. A. Smith & Company. In the month of April of that year, I went up to the reservation and examine the logs here in controversy for the purpose of determining the per centage of white pine and Norway. In my opinion, about 14 % o the logs were white pine and the balance Norway.

110 FRANK W. BONESS, sworn on behalf of the defendants, tes tified as follows:

I have been in the lumber and logging business in Minnesota for twenty-six years. I was acquainted with the market prices o pine logs in the spring of 1892. In my opinion, the value about May, 1892, of a lot of logs at the Winnebigoshish dam and in that neighborhood on the bank, about 14 % of which were white pine and the balance Norway, of a fair average quality of logs as they come into the Minneapolis market, running about seven or eight t the thousand, was about $5.00 per thousand feet.

Cross-examination:

I fix this price according to the market for logs at Minneapolis in the boom limits. That spring, logs like these were worth six or six and a half dollars per thousand. It would cost about a dollar or a dollar and a half to get them to the boom limits.

WILLIAM MILLER, sworn as a witness on behalf of the defendants, testified that he was a lumberman and acquainted with the value of pine logs in the spring of 1892; that, in his opinion, the value of the logs described, where they were in May, 1892, was about $5.00 a thousand.

CHARLES A. SMITH, recalled on behalf of defendants, testified as follows:

I am one of the defendants. In 1891, I was a member of the firm of C. A. Smith & Company, and secretary and treasurer of the Pine River Logging & Improvement Company.

We had had some contracts with some Indians during the season of 1890–'1; and in the fall of 1891, some of the Indians came to my office in Minneapolis—there were several of them, three or four or five; I don't remember them all, but I remember Charles Losh, John Lyons, and I am pretty sure one of the Bongas was there. The contracts were afterward signed on the reservation, about the first part of November, as I remember.

The following question was then asked the witness:

Q. Was anything said by the Indians who saw you as to the amount of dead timber on the reservation that winter:

Objected to by plaintiff as immaterial and incompetent.

Objection sustained, and defendants duly excepted.

Defendants' offered to prove by the witness that at this meeting and conversation between Mr. Smith and these Indians the Indians informed him that there was a large amount of dead and down timber on the reservation, which could be cut.

111 Counsel for plaintiff objects to the offer as incompetent and immaterial; the objection was sustained, and defendants excepted to the ruling.

The witness then proceeded.

The contracts were prepared in Minneapolis, were taken to the reservation by Mr. Rogers and Mr. McAllister, and after they were executed were returned to us. They were then taken down to Washington, and we were advised that they had been approved. We then sent two men up there to see that supplies were furnished to the different loggers and that the logs were properly cut and marked. We also established a supply depot at Deer river, at the end of the railroad. This is close to the reservation, but not as I understand it on the reservation. Mr. Meldahl had charge of this depot and distributed supplies as they were called for, and kept accounts of them. My understanding is that he stayed at Deer river during all the winter.

The duties of Mr. Mereen were to see that the logs were properly cut, as to length and that they were properly marked. It was also his duty (—) that the time checks issued by the contractors should be O K'd by him and if not by him, then by McAllister.

Mr. McAllister was to see that the camps were supplied with the necessary supplies and logging outfits, and to O K the time checks. He had no other duties, to my knowledge. Neither McAllister nor Mereen nor Meldahl, at any time, exercised any authority or any control over the cutting of the logs in directing what timber should be cut there, certainly not with my knowledge or consent.

I was upon the reservation in January, about the 15th, as I remember. I visited most of the landings, but not all. I did not visit the Lyons landing nor the Bonga landing on Six Mile brook nor the White Oak Point landing nor the Losh landing near Ball Club lake. My purpose in making the visit was to see what logs they were cutting and how they looked, etc. I was not in the cuttings at these places, except as the road took us there, with one exception. At the Bonga camp on Leech lake, there were no logs on the landing, and during the noon hour we walked out in the woods and saw some logs on the skidways. With that exception, so far as I remember, I did not go into the woods, excepting as the road took us through the cuttings. My recollection is, I was three days going through there. On this visit, I did not exercise any author-

112 ity or control over the contractors and the men working there as to the cutting. I made no suggestions as to the kind or character of the timber they should cut.

My second trip was in March, about the 7th. I intended to make a general trip over the woods, but when we got to Deer river we

found there had been a very heavy snowstorm, which made it almost impossible to get through the woods. I stayed that night at Deer river, and in the morning we drove down to the White Oak Point landing, and then back to the station, where I took the train. That was the extent of my second trip. On this trip, I did not, so far as I remember, see any one working in the camps or any one in any way connected with the operations. I made no suggestions to any one as to what timber should be cut. I think we had no conversation with any one up there as to the character of the timber they were cutting. There may possibly have been something said about the timber, but I cannot remember that there was anything said of material consequence. So far as I could tell from the logs on the landings, my impression was that it would come fairly well under the contracts. In fact, I would say this: That I didn't pay very much attention to it, because I felt that the Government was cutting the logs, or superintending the cutting, and that we had nothing to do with the character of the logs until after they were banked on the landing. As near as I could judge from the logs I saw and such of the cuttings as I passed through, I thought the timber would come fairly well under the contracts.

After the logging season was over, a settlement was made at the White Earth agency. Capt. Schuler, the Indian agent, was there, Mr. Gerhardt was there for J. B. Bassett & Company, I was there and my best recollection is that all of the Indian contractors were there. The settlement was made by figuring out the amount of logs put in under each contract from the scale bills rendered by the surveyor general; then the price stipulated in the contract was taken, and the amount due each contractor arrived at on that basis; then the vouchers for the supplies furnished and all time checks were deducted from those amounts and the balances were paid by check to Capt. Schuler, the Indian agent.

(The witness was then shown Defendants' Ex. 3.)

This is the check which I gave to Capt. Schuler at that time.

(Said check was then read in evidence, a copy of which is hereto attached.)

(Witness was here shown Defendants' Exhibits 16 and 17.)

113 These are the transfers of the log marks which were given to us by Capt. Schuler.

(Defendants then introduced in evidence Exhibits 16 and 17, copies of which are hereto attached, for the purpose only of showing a settlement between the defendants and the Indians.)

At the time of this settlement, I believed the logs came under the contract; I had not consulted any attorney as to what might be the legal construction of the contract. I construed these contracts the same as I construed other similar contracts. My belief certainly was that we had a right to take those logs under these contracts, both as far as quality and quantity was concerned. I was acquainted with the value of logs and pine stumpage in the spring of 1892.

In my opinion, these logs in May, 1892, where they then were, were worth from $4.00 to $4.50 a thousand. In my opinion, the stumpage, the standing trees, were worth from a quarter to half a dollar a thousand.

(Witness shown Exhibits 12 and 13.)

This telegram and this letter were received by the Pine River Logging & Improvement Company about the time of their respective dates. (These exhibits were offered in evidence, and counsel for plaintiff objected to each of them as incompetent, immaterial and irrelevant, which objection was sustained, and defendants duly excepted.)

(Copies of said exhibits are hereto attached.)

Cross-examination:

The supply bureau carried a stock of supplies for logging operations and furnished them to the operators and contractors. We were not discounting any time checks, excepting we were paying time checks.

(Witness is here shown Plaintiff's Exhibits F 1, F 2, F 3.)

After reading the letters, witness proceeded:

I will modify my statement to this extent. The contract provided for payments to be due on the 15th of April. Time checks given during the winter, due the 15th of April, were discounted at 10 per cent. per annum. In one case, apparently, there is a discount to the cashier of the Bank of Grand Rapids. We discounted time checks only so far as the time that the time checks had to run.

114 (Plaintiff's Exhibits F 1, F 2, F 3 are introduced in evidence, copies of which are hereto attached.)

The time checks which were to be O K'd by Mr. Mereen or Mr. McAllister were similar to the one which is Plaintiff's Exhibit E. They were issued by the contractors at the different camps for labor performed in getting out timber. They were used generally throughout these camps, and I presume the printed form was furnished by us. They have printed on them, "Not good unless O K'd by Mr. H. A. McAllister, or Arno Mereen." They were our agents. It was our duty to see that the labor was paid for in order not to have a lien against the logs. For that reason, we had to have them O K'd for our security that they were all right; but if we did not pay them, they would probably be paid by the Indian agent, provided they were presented in time. As a matter of fact, we paid the large bulk of them and turned them in at the settlement in lieu of cash. The printed clause as to their being O K was for our protection. Outside of the time checks, there was a considerable number of supply bills for supplies furnished from our depot, which were also turned in as cash at the settlement.

The Jack Bonga cutting at Leech lake was the only cutting I went through, as far as I remember, except as the roads took us

through. I would modify this to this extent: At Cass river, where Lydick was foreman, we got in there in the evening just before dusk. I was anxious to see the logs that evening as we wished to get an early start in the morning, and started out to see the logs that evening. I walked down through the cutting, but it was quite dusk and we hurried straight through the cutting to the landing. I think I went on the logging roads, or tote roads, when I was going to the camps. In most of the cases, the camps were between the landings and the cuttings, and in those cases we only went to the camp. In some cases, I only went to the landings, and not to the camps. We drove on the lakes and ice where we could, and naturally would come to the landings first.

I went up there to inspect the logs and see what kind of logs we were getting. They were a good fair average lot of logs. Some of them showed considerable signs of injury and some of them did not. The larger part of them were good, sound logs, with no particular marks of damage on them. I have no recollection that we gave a bond to observe the law as to intercourse with the Indians, and the regulations prescribed and the carrying out of our part of the contract. My impression is that no such bond was given,
115 although we might possibly have given one. The reason why I paid so little attention to the character of the cuttings was that I considered that the timber was looked after by the United States Government, and that whatever logs were cut were cut under the supervision of the agent and that we had nothing to do with the condition of the timber. The contracts provided that we should take the logs at the landing. I considered the Indian agent perfectly competent to judge what was proper and what was not. As far as the logs at the landings were concerned, I couldn't tell whether they were cut from green timber or not. The fact that a very large number of them had clear sap and showed no signs of serious fire need not necessarily suggest the fact that many of them had been or might have been cut from green trees; I don't think it did.

In saying that Lydick was foreman at one camp, I do not know that any one hired him as foreman. So far as I know, he might or might not have owned the camp.

I have known Mr. Tidd for a great many years. I have known him by reputation for a good many years. That is the reason I stated I considered him perfectly competent. I don't remember that I knew anything at that time about any connection between the camps of Lydick and Lyons and Wakefield and Mr. Fairbanks.

In O K'ing these time checks, Mereen and McAllister were acting as our agents, and not as the agents of the contractors. There was a considerable amount of long timber in these logs,—about 5 %, that was secured at my request.

As to the stumpage value of this timber, if the same trees had been located in the same way, with reference to streams, etc., but on private lands instead of on the Government reservation, I would think the stumpage would then have been worth from $1.00 to $2.00 per thousand; possibly, somewhere in the neighborhood of $1.00, and in places, possibly more.

On this trip through the reservation, if I had chosen, I could have investigated more and seen just what they were cutting.

Redirect examination:

At the time I was at the Jack Bonga cutting, they had not yet begun to haul logs to the landing. My understanding was that we had no obligations whatever to see that the Government regulations about the cutting of timber were being carried out. The Government had never furnished me a copy of these regulations, and I did not know what they were.

116 As regards the logs at the landing, it would be impossible to judge whether they were cut from the standing green trees or from down trees; so, logs cut from trees that had been recently seriously injured by fire would look perfectly green.

I have known Mr. Tidd for a good many years, and he has been engaged in logging for himself and others.

My understanding of the term "dead timber" was that it included trees which were absolutely dead and trees that were so injured that they would die within a comparatively short time, and also trees that were blown down, although they might be still perfectly green.

The following question was then asked the witness:

Q. What was your understanding, Mr. Smith, as to the meaning of the term "dead timber," as applied to individual trees?

Counsel for plaintiff objected to any testimony as to what the witness understood on that subject as immaterial and irrelevant.

The objection was overruled by the court on the ground that testimony was relevant as to the question of good faith, and plaintiff's counsel duly excepted.

A. Where trees are absolutely dead, showing not a particle of life, and where trees are so injured that they will die within a very reasonable time, that is, within a comparatively short time, and of course in case of windfalls where the trees are down and still may be perfectly green, I would classify them as dead timber, because they would die within a reasonable time.

As regards a body or bunch of timber where the largest percentage of the trees was absolutely dead or so injured that it would die within a comparatively short time, I would classify the whole bunch as dead timber.

The following question was then asked the witness:

Q. As regards such a bunch of timber as mentioned in your last answer, what was the meaning of the term "dead timber," as generally and commonly used in the State of Minnesota by lumbermen with reference to lumbering and logging operations?

Counsel for plaintiff objected to this question as incompetent, immaterial and irrelevant.

Counsel for defendants stated that the question was not asked for

the purpose of showing the intent of the parties, but as bearing upon the legal construction of the contract.

117 Thereupon, the objection was sustained, and defendants duly excepted.

Defendants then offered to prove by this witness that at the time these contracts were entered into and for many years prior thereto, the term "dead and down timber," as generally and commonly used in the State of Minnesota, by lumbermen, with reference to lumbering and logging operations and logging contracts, was understood to mean and was used as meaning a bunch or body of pine trees the great proportion of which had been injured by fire so that they were dead or would die within a short time, although a small proportion of the trees scattered through the bunch were practically uninjured by the fire.

At the time of making this offer, counsel on behalf of the defendants state to the court that the offer is not made for the purpose of showing intent, but as bearing upon the legal interpretation of the contract.

Counsel for plaintiff objects to the offer as immaterial, incompetent and irrelevant.

The court sustains the objection and counsel for defendants excepts to the ruling.

Recross-examination:

Mr. McAllister was in the employ of the defendants during the operations up there, was looking after the drive and had charge of the logs, and was representing the defendants at the time the logs were seized.

FRANK C. GERHARDT, sworn on behalf of the defendants, testified as follows:

I was at the White Earth Indian reservation in April, 1892, I was in the employ of J. B. Bassett & Co., and went there to make a settlement with the Indians under these contracts. Mr. C. A. Smith was with me, and we met all the contractors and the Indian agent, Mr. Schuler and his clerk, Mr. Funk. We went over the papers. They produced vouchers for supplies furnished the camps and the cash that had been paid to the different contractors. They turned them in to the agent, and he had them all gone over. A schedule was made of the settlement, the settlement was made and we paid the balance in cash to Mr. Schuler.

(Witness is shown Defendants' Ex. 7.)

This is the schedule that was used at that time. These are the figures on which the settlement was made.

118 (Defendants' Ex. 7 was then introduced in evidence, a copy of which is hereto attached.)

The witness then proceeded:

No separate account was made of the dealings at the Lyons and

Wakefield camp or the Lydick camp or the Jack Bonga camp. No separate accounts were made for these camps. The account was made out simply with the five contractors, Fairbanks, Losh, Tuttle, Sho-cag-e-sic and the Bonga Brothers.

The time-checks and supply bills were there, and we presented them to the Indian agent and he accepted them as so much payment on the logs. The balance was paid in cash. The Indians were there when this took place. They made no objections to this, so far as I heard.

(Defendants' Ex. 4 was here shown the witness.)

This is a check of J. B. Bassett & Company to my order, which I endorsed and turned over to Maj. Schuler.

(Defendants' Ex. 4 was introduced in evidence, a copy of which is hereto attached.)

(The witness was here shown Defendants' Exhibits 5 and 6.)

These are receipts for the value of the logs given to Mr. Smith and myself at that time.

(Defendants' Exhibits 5 and 6 were introduced in evidence, copies of which are hereto attached.)

The total amount of logs that the Indians were given credit for was $79,935.19. The amount that had been paid them was $56,165.28. The balance was these two checks.

Cross-examination:

This money was not paid to the Indians while we were there. I don't know what distribution was made of it.

ARNO MEREEN, sworn on behalf of the defendants, testified as follows:

In the winter of 1891–'2, I was employed on the Chippewa Indian reservation. Mr. W. L. Bassett employed me. I also had a talk with Mr. C. A. Smith. My instructions were to see that the logs were cut in proper lengths and properly marked and stamped. Later on, they wrote me to O K. time-checks. I was not instructed to perform any other duties up there. I was up there from the 18th of December until the 28th day of March. I looked after the cutting of logs and marking and stamping and O K'd the time-checks. I did not do anything else. I had nothing to do with directing what timber should be cut. I gave no instructions and made no suggestions about that.

119 The character of the logs, as they were landed—some of them were burned at the butt; a large majority of them. That is, the bark was charred, and others were sap-rotten. Others were green; some of the tops were—that is, the top logs were sap-rotten and showed the color of the sap; also some of the butt logs—the sap was colored. My work was mainly on the logs. I didn't see but very few trees cut. I saw the cuttings, more or less. The

fire had run through all the cuttings that I was in. I saw Mr. Tidd around the reservation quite often that winter. He was looking after the cutting of the timber for the Government. There was no one else there that had general oversight of the cutting.

Cross-examination:

I oversaw the putting on of the marks on the landings and in the woods. The first of that winter the marks were put on in the woods. About the time we commenced to haul the logs, the stamp marks were put on at the landings. The bark marks were put on in the woods all the time.

I went through the cuttings more or less during that winter. I knew the general character of the trees they were cutting. Taking them all together, they were a good, fair average lot of logs. There is some dead timber in most any lot of logs and stump-burned logs. From time to time, I was at each one of the cuttings that was going on that winter. I should judge I visited the various camps once in two weeks from December 18th until March 28th. I saw very few of the boom sticks that were cut for these logs. I was taken sick, and left before they cut many of the boom sticks.

Defendants here offered in evidence from the office of the Department of the Interior a certified copy of the appointment of Tristram W. Tidd as superintendent of the Indian logging camps at the White Earth agency for the winter of 1891–'2.

WILLIAM L. BASSETT, sworn on behalf of the defendants, testified as follows:

I have lived at Minneapolis all my life, and have been in the lumber business.

After the execution of the contracts described in the pleadings, we sent three men up to that territory. Mr. Meldahl had charge of the store at Deer river, Mr. McAllister looked after the supplies for the camp, and Mr. Mereen looked after the marking and stamping of the logs more especially. So far as I know, these men did not have instructions to do any other business up there. To my knowledge, they did not do anything else.

120 I was up at those camps once—my best recollection is, the first part of January. I went to Deer river and met Mr. Tidd there, not by appointment, but he was there, and we drove through the camps together. That is, the camps that were established at that time. I think there were eleven of them then. I think I did not visit the White Oak camp, nor the Lyons and Wakefield camp, which was subsequently moved to Cass lake. I think I was there four or five days. I went up there to look over the logs.

In connection with my lumbering, I usually drive into the woods once or twice during the winter to see the logs. I saw these logs on the landing.

As regards to seeing the cuttings, we drove into one cutting of Lyons and Wakefield on the Mississippi river. I think I also went into the cutting of Bonga, up on Leech river or Leech lake. I also

went into the Tuttle cutting, where Sid McDonald was foreman. In driving along what is called the tote road, we might sometimes go through some of the cuttings; but, as a usual thing, we took the tote road, which did not always go through where the cuttings were being made; because, as I say, my main object up there was to see the logs that were put on the bank. At the time I was there, the cuttings, so far as I saw them, seemed to me to be such as were proper in connection with these contracts, except at the Wakefield and Lyons camp on the Mississippi river. Capt. Tidd and I were there together, and neither Wakefield nor Lyons was there, but we drove out into the woods. We drove back about two miles, I think, from the river. My best recollection is, along the river bank there was mostly Norway; but as we got back about a mile and a half or two miles, there was a large amount of white pine. I told the Captain at that time—it was none of my business—I told him I thought those logs were not sufficiently burned so they ought to be cut under these contracts. As I understand, this was the cutting which was subsequently stopped. I know they removed from that camp. This was the only time I was up on the reservation.

At the time the settlement was made, and at the time these logs were seized, so far as I had seen them, and so far as I knew of them, I had no reason for not believing that they were of a character that would come under these contracts. I certainly thought we had a right to receive the quantity of logs which was delivered to us.

The reason for establishing the supply bureau was that there wasn't a man under these contracts that had any particular
121 credit, and it was pretty nearly a sure thing they would have to get some goods somewhere; and if they went out into the market without any credit, they might have to pay four or five different prices for them. It was our object, as much as possible that these men should make something under these contracts. If they lost, not being responsible people, we would have to make up for any loss, as we did under one of the contracts, which was about $800. It was our object to see that they should get supplies at reasonable prices. No effort was made, to my knowledge, to force them to buy the supplies of us. I never gave any directions or instructions outside of this one conversation with Mr. Tidd, as to what timber should be cut up there. I do not know of any one, other than the Government agent, having given any instructions as to what timber should be cut. I was acquainted with the value of logs and the stumpage in the spring of 1892. I think these logs, in May, 1892, as they were then situated, were worth from $4.00 to $4.50 a thousand. In my opinion, the value of the stumpage,—that is, of the standing trees,—was about what the Government placed them at, from forty to forty-five cents a thousand.

Cross-examination:

I can't tell the order in which we visited these camps. I think we visited the Lyons camp on the first part of the trip. Capt. Tidd

went with me through this trip. I presume this was one of his rounds of inspection. We went together to the same places and I had the same opportunities as he to see what was being done. At the Lyons and Wakefield camp, he inspected the timber from the sleigh. Mr. Tidd is a very heavy, large man. I think he did the most of the inspection in driving through the roads that winter. I think we made about eight per cent. profit on the supplies furnished from the supply bureau. The purpose of the supply bureau was to enable these Indians who had no credit to get goods at what we considered a reasonable price, if they wanted to buy of us; but there was no obligation on them. We felt that we were standing behind them and would have to make up any deficiencies.

The stumpage of this timber, if the trees had been situated in the same way on private land, and we could have bought the stumpage outright, would have been worth from $1.00 to $1.25 a thousand.

I have owned pine lands elsewhere. There are usually more or less marks of fire on the pine, but when you come to a landing of logs, you don't see very much indications of fire, unless they have been fire-burned.

122 I did not know what the rules for cutting the timber were, although I naturally supposed that the authority given by the President was hedged in with certain rules.

In going from camp to camp with Mr. Tidd, I went over a good many logging roads where, if I had chosen, I could have seen just what was being done. I visited all the landings, except at the White Oak cutting and the last camp of Lyons and Wakefield, on the Mississippi. I think it was four or five days from the time we left Deer river until we got back.

The logs cut under the contracts were divided equally between C. A. Smith & Company and J. B. Bassett & Company, and not according to the amounts named in the contracts. As to our receiving 8,000,000 feet of logs under a contract calling for 500,000 feet, my answer is this: If those were logs properly coming under the description of dead and down timber, I would consider it perfectly proper for us to receive 8,000,000 feet, because I was present when we had a talk in Washington about the logs being cut. If all of the dead timber there was on the reservation had been cut during that winter, and we paid for it and got a receipt for it, I should think, under those contracts, we were entitled to it. We gave a bond when the logs were seized, but I do not remember that we gave any bond when the contracts were made. We may have given such a bond; but I do not now recollect it.

Redirect examination:

In placing the value of this stumpage as higher on private land than on Government land, I consider that the cost of logging, if we could have done it ourselves, would have been materially less than as done by the Indians. I think those logs could have been banked right through for about $2.50 a thousand, if we could have controlled it ourselves. I thought we were entitled to receive this

quantity of timber, because if the dead and down timber were not cut, it would become worthless, and of no value to any one.

Defendants here rested.

ESSINGTON H. FUNK, sworn for plaintiff in rebuttal, testified as follows:

I was present at the settlement for the logs in controversy, which has been testified to. I was there as clerk for the United States Indian agent. I think John Lyons and George Lydick and I-ah-bance and James Drumbeater and Jack Bonga were all there. I think they were all consulted about this settlement. They were all there, looking after their several interests under these contracts. Before the defendants' checks were accepted, each one of them
123 went over the bills that were charged up to them and O K'd all the bills. The distribution of the money was made in this way among these various contractors and subcontractors; they took each contract separately, and figured out the amount and value of each contractor's logs, and deducted ten per cent. stumpage, and half the scalage and the time-checks and the bills and the balance was turned over to the individual contractors and so-called subcontractors. Defendants' Ex. 7 is a correct statement of the account that was made at that time, with the five Indians named in the contracts. It was upon that accounting that defendants' two checks were given for the balance.

The testimony here closed.

All of defendants' testimony bearing upon the question of good faith was received subject to the objection and exception of plaintiff as to its materiality, competency and relevancy, with the understanding that its propriety should be finally ruled upon at the close of the testimony.

Under this arrangement, at the close of the testimony, plaintiff moved the court to strike out all the evidence offered by the defendants with reference to their good faith in the transactions in this case, which motion the court denied, and to which ruling plaintiff duly excepted.

Thereupon, plaintiff moved the court to instruct the jury to return a verdict in favor of plaintiff and against the defendants for the sum of $88,269.94, being the value of 14,850,260 feet of logs at $4.00 per thousand feet, with interest thereon at 6% per annum from May 31, 1892, to July 6, 1900.

Said motion was granted by the court, to the granting of which motion defendants duly excepted.

The court thereupon charged the jury as follows:

GENTLEMEN OF THE JURY: The issues in this case have been very much narrowed by the decision of the circuit court of appeals in this case. There was an issue which has been urged upon the attention of the court with regard to the good faith of the defendants, as bearing upon the measure of damages. The court, after hearing arguments upon that subject, has come to the conclusion that the

defendants are liable for the value of the logs as they were banked upon the streams and lakes in the neighborhood where they were cut. That left open for consideration the question of the quantity of logs and their value. These issues, however, have been entirely eliminated by the action of the attorney representing the Government of the United States. He has consented to accept as the quantity of logs the amount which the defendants in their answer
124 admit that they received, waiving any claim for any larger amount, to wit: 17,600,260 feet; and from this quantity, he consents that there be deducted the amount which the defendants were entitled to receive under their contract, to wit, 2,750,000 feet, thus seeking to recover for only 14,850,260 feet. Counsel on behalf of the Government has also eliminated the issue in respect to the value of these logs by consenting to accept as the value thereof the lowest sum named in the evidence, to wit: $4.00 per thousand feet. You will remember, the evidence ranged from four to five and a half dollars, and he has consented to accept as the value this lowest amount of four dollars. Making the computation upon that basis, the value of the logs is $59,401.04. The Government, under the law, is entitled to interest upon the value of the logs at 6 per cent. from the time of the conversion. The evidence in respect to value has not fixed any specific date, but has related to the month of May, 1892, and in making the computation the last day of the month of May has been accepted, and the interest has been computed from the 31st day of May, 1892, at 6 per cent. per annum, making the interest $26,868.90; adding to this, value of the logs, makes a total amount of $88,269.94.

You will see, gentlemen of the jury, that all the issues which would have been proper for your determination have been eliminated from the case by the stipulation of the counsel representing the Government; and it therefore becomes my duty, as a matter of law, to direct you to return a verdict for the amount last named. You will remember that at the time you were sworn as jurors in this case, the oath required you to accept the law from the court, and in finding this verdict pursuant to the direction of the court, you are not passing upon the issues, but are simply accepting the law from the court.

Counsel for the defendants then and there excepts to the charge of the court directing the jury to return a verdict in favor of the plaintiff for the amount named.

The jury thereupon, pursuant to the instructions of the court, returned a verdict in favor of the plaintiff and against the defendants for the sum of $88,269.94.

Upon motion of defendants' attorneys, it was ordered by the court that defendants be given a stay of forty-two days in which to prepare and present to the court a bill of exceptions and a motion for a new trial herein.

The above and foregoing, with the exhibits hereto attached, includes all the evidence introduced or offered and all the proceedings had upon the trial of the above-entitled action.

125 And because none of said matters above set forth, or said evidence, rulings, charge or refusal to charge, or exceptions appear upon the record, the defendants present this, their bill of exceptions and pray that the same be signed and sealed by the acting circuit judge who tried said cause, and the matters and things therein stated be made a part of the record in said cause, and it is done accordingly at the term of court at which said cause was tried and within the time limited by the court for presenting this bill of exceptions and for signing and sealing the same.

Dated this 21st day of August, 1900.

CHARLES F. AMIDON, *Judge.*

PLAINTIFF'S EXHIBIT "B."

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
WASHINGTON, *Aug.* 20, 1895.

I, D. M. Browning, Commissioner of Indian Affairs, do hereby certify that the papers hereto attached are a true copy of the originals as the same appear on file in this office.

In testimony whereof, I have hereunto subscribed my name, and caused the seal of this office to be affixed on the day and year first above written.

[SEAL.] D. M. BROWNING, *Commissioner.*

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *October* 15, 1890.

The President:

I have the honor to submit herewith a communication of 11th instant from the Commissioner of Indian Affairs, relative to the sale of dead and down timber on the White Earth and Red Lake reserves in Minnesota, under the act of February 16, 1889 (25 Stats. 673), which provides,

"That the President of the United States may, from year to year, at his discretion, under such regulations as he may prescribe, authorize the Indians residing on reservations or allotments, the fee to which remains in the United States, to fell, cut, remove, sell or otherwise dispose of the dead timber standing or fallen, on such reservation or allotment for the sole benefit of such Indian or Indians. But whenever there is reasonable cause to believe that such timber has been killed, burned, girdled or otherwise injured for the purpose of securing its sale under this act, then in this case such authority shall not be granted."

Last year, executive authority was granted for the cutting and sale of dead and down timber on these two reservations, and also on the White Oak Point reserve in this year's authority is as follows:

126 "Mr. Rice is now employed in an effort to secure the removal to the White Earth reservation of such of the Chippewa Indians on the Leech Lake, Mille Lac and Winnebigoshish reserva-

tions, as are entitled to and are willing to make their permanent home on that reservation and to accept allotments there, and if the Indians on those reservations are permitted to enter upon logging operations, which from the nature of the business cannot be concluded before late in the next spring, it would seem that such permission would operate at least to delay the removal of many of the Indians who would probably otherwise be willing to go upon the White Earth reservation this fall."

"As any of the Indians may, under the Chippewa agreement, elect to remain upon the reservation where they are now located, and refuse to remove to the White Earth reservation, permission might be given to those who remain to log on their reservations, but the propriety of such action is rather questionable for the reason that such permission might influence the election of some of the Indians, who would otherwise remove, to remain where they are."

Concurring in his views, I have the honor to request that authority be granted the Indians on the Red Lake diminished reserve and on the White Earth reserve, Minnesota, to cut and dispose of the dead and down timber during the current fiscal year under the following rules and regulations:

1st. That each Indian who engaged in the work of preparing for market the dead and down timber on his reservation during the current fiscal year shall provide his own logging outfit and supplies.

2nd. No Indian to be allowed to log who has children of school age not attending school a reasonable length of time each year, unless in the opinion of his agent, some good reasons exist in special cases which are sufficient to exempt particular persons from this requirement; otherwise, every Indian on the reservation not well employed, should be permitted and encouraged to engage in the work, and no favoritism shall be shown by the agent in his management of the business.

3rd. A reliable and otherwise properly qualified white man to be detailed, if any such can be spared from the agency employé force; or if no regular agency employé is available, then to be appointed by authority of the Secretary of the Interior and to be paid a reasonable salary from the proceeds of the sale of the logs, for such time as service may be actually necessary, whose duty it will be to go into the woods with the loggers and superintend and direct their labors, to the end that no green or growing timber may be cut, and that no live trees are damaged in any manner, so as to cause
127 them to die that they may be marketed under the provisions of the act in question, and to inspect the scaling of the logs.

4th. With the exception of a superintendent provided for by the preceding item, and in cases where persons of sufficient knowledge and skill for foremen and blacksmiths cannot be found among the Indians, all white labor to be excluded from the reservation.

5th. One-half of the cost of scaling to be paid for by the loggers, and one-half by the purchasers of the logs.

6th. The logs shall be cut and banked or otherwise made ready for sale by the Indians under the supervision of the superintendent

and direction of the agent, at such place or places as he shall direct, and shall be sold at public sale to the highest bidder either by auction or by calling for sealed proposals at the discretion of the Secretary of the Interior, in such lots as shall be most expedient, and under the personal direction of the agent, for cash, after at least two weeks' notice by publication in newspapers at the places where the usual markets for logs exist, and where best calculated to give notice; also, by such other means as shall give greatest publicity.

7th. No sale of the logs to be valid until approved by the Commissioner of Indian Affairs.

8th. Ten per cent. of the gross proceeds derived from the sale of the logs to go to the stumpage or poor fund of the tribe, from which the old, sick and otherwise helpless may be supported.

9th. All expenses of sale, such as advertising, telegraphing, one-half of the cost of scaling, and ten per cent. of the gross proceeds of the sale, for the stumpage or poor fund, to be deducted, and the net proceeds remaining to be divided and paid by the agent to the individuals or companies of the tribe in exact proportion to the scale of logs banked by each.

I have the honor to be

Very respectfully your obedient servant,

JOHN W. NOBLE, *Secretary.*

6574, Ind. Div. '90.

(Four enclosures.)

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *November* 21, 1890.

The President:

Under date of 17th *ultimo*, you authorized the cutting and disposal of the dead and down timber upon the White Earth and the diminished Red Lake reservations in Minnesota, and approved the rules submitted governing the cutting and scale of said timber.

128 The reason given to you for not including the other Chippewa reservations in Minnesota in the request for authority to cut the dead and down timber was as follows:

"Mr. Rice is now employed in an effort to secure the removal to the White Earth reservation of such of the Chippewa Indians on the Leech Lake, Mille Lac and Winnebigoshish reservations as are entitled to and are willing to make their permanent home on that reservation and to accept allotments there, and if the Indians on those reservations are permitted to enter upon logging operations, which from the nature of the business cannot be concluded before late in the next spring, it would seem that such permission would operate at least to delay the removal of many of the Indians who would otherwise be willing to go upon the White Earth reservation this fall."

"As any of the Indians may, under the Chippewa agreement, elect to remain upon the reservation where they are now located, and refuse to remove to the White Earth reservation, permission might be given those who remain to log on their own reservations, but the propriety of such action is rather questionable for the reason

that such permission might influence the election of some of the Indians who would otherwise remove, to remain where they are," and for this reason the department, on the 24th ultimo, declined to approve the contract between Charles Losh and Nellie Lydick, partners as Losh & Lydick, Indians of the Lake Winnebigoshish reservation, and the Pine River Logging & Improvent Company, for the cutting and disposing of about 4,000,000 feet of pine logs from the dead and down timber of the Lane Winnebigoshish reservation, Minnesota.

Under the date of the 24th ultimo, the Commissioner of Indian Affairs was notified of your approval of the contract of Messrs. P. and J. Meehan with the Red Lake Indians for cutting dead and down timber on the Red Lake diminished reserve.

I have now the honor to submit herewith a communication of 10th instant from the Commissioner of Indian Affairs, wherein he recommends a modification of the executive authority of October 17th, so as to allow the cutting and sale of dead and down timber on the other Chippewa reservations in Minnesota.

His recommendation is based upon the report of Chairman Rice of the Chippewa commission, who says that the Indians on the reservations other than the White Earth and Red Lake, within the White Earth agency, are very poor and unable to procure work; that the lumbering season ends in March, and the removals from those reservations to the White Earth reservation cannot be made before May on account of
129 the late opening of spring; that if the Indians can procure employment, they will be more contented, more easily found and controlled, and much better provided with clothing when spring opens; that the minds of some of the Indians at Leech Lake and White Oak point, who are workers and the most desirable to start first, have been prepared for removal; and that logging is the only work that presents itself.

Concurring in the recommendation of the Commissioner of Indian Affairs, I have the honor to request that authority be granted the Indians on the other Chippewa reservations in the State of Minnesota, to cut and dispose of their dead and down timber for such time during the current fiscal year as you deem proper, under the rules prescribed by your order of October 17th relating to the cutting and disposal of timber on the diminished Red Lake reserve; and I have the honor also to recommend that the department and the Commissioner of Indian Affairs be authorized to approve the contract between Losch and Lydick, Indians of the Lake Winnebigoshish reservation, and the Pine River Lumber & Improvement Company (incorporated) above referred to, upon such conditions and restrictions as may be deemed necessary for the protection of the Indian loggers.

If you concur in these recommendations, I respectfully request that your approval may be endorsed hereon.

I have the honor to be, very respectfully, your obedient servant,

JOHN W. NOBLE, *Secretary.*

7286, Ind. Div. '90.
7528, " " "
9 enclosures.

Indorsed: Executive Mansion, November 22nd, 1890. Approved: Benj. Harrison.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *November* 28, 1890.

The President:

In the within communication, Hon. Henry M. Rice, chairman Chippewa Indian commission, refers to the promise made to the Chippewas in relation to the cutting of the fallen timber on their ceded lands, and says this lumbering is the only means of support they now have; that the Red Lake Indians have put up hay, built camps and a dam, expecting the privileges of cutting such timber prior to the survey and estimate.

Based upon this report, the Commissioner of Indian Affairs, under date of 24th instant, recommends that the Red Lake Indians be authorized to log the dead timber, standing and fallen on the ceded lands for this season, at least.

130 On inquiry at the General Land Office, I am informed that the surveys on the White Earth and Red Lake reservations are progressing as rapidly as possible, and it is hoped they will be completed by early spring.

In view of these statements, I am of opinion that the Red Lake Indians should be allowed to cut and dispose of the dead and down timber on their ceded lands during this season: and I have the honor to request that executive authority of October 17th last be modified so as to include the cutting of dead and down timber on their ceded lands, under the same rules and regulations as were prescribed by said authority for lumbering on their diminished reserve lands, and that such authority be endorsed hereon.

I have the honor to be, very respectfully, your obedient servant,

JOHN W. NOBLE, *Secretary.*

7679, Ind. Div. '90.

Two enclosures.

Indorsed: Executive Mansion, December 1st, 1890. Approved; but the greatest care must be taken to limit the cutting to "dead and down timber." Benj. Harrison. Filed July 2nd, 1900. Henry D. Lang, clerk.

PLAINTIFF'S EXHIBIT "C."

This agreement, made and entered into by and between the Pine River Logging & Improvement Company and J. B. Bassett & Company, parties of the first part, and Clark Clay of Grand Rapids, Minnesota, party of the second part,

Witnesseth: That said party of the second part, for and in consideration of payments hereinafter named, agrees to take all logs as landed under first party's Indian contracts and drive same clean within the limits of the Mississippi and Rum River Boom Company's boom below the Brainerd dam, during the season of 1892, and as early as the stage of water will permit.

Said second party agrees to exercise due diligence in preparation for said drive, and also in the prosecution of the drive, and said first party reserves the right to take said drive at any time when in the judgment of the agent of the said first party the work is not being carried on with proper energy and judgment. If, after using proper exertion, any particular lot or lots of logs cannot be brought in during this season, the payments for the driving of the same shall be made when driven as provided in this contract. It being understood that said second party will bring such drive within boom limits as soon as possible.

131 The first party, through its agents, reserves the right to stop work on any lot or lots of logs, should the getting of the same into the main drive appear impossible; or should the delivery of same so compromise the main drive as to keep it from getting into the boom limits so that the logs can be used during the coming season.

The price for driving said logs shall be one dollar and ten cents ($1.10) per thousand feet. Payments to be made as follows:

Fifty (50) — per thousand feet when the drives are in the Mississippi river and ready to be started. Enough more to make eighty-five (85) cents per thousand feet when through the Pokegama dam. Balance to be paid when the drives are driven clean within the boom limits.

It is mutually understood and agreed by the parties hereto, that should any drive or drives be hung up by mutual consent, such money only shall be withheld on payments as shall represent the driving price on that particular drive or drives.

The parties of the first part reserve the right to put a man or men on the drive, to work on same, and to see that the logs are brought in clean. Regular driving wages of such man or men are to be paid by the party of the second part.

CLARK CLAY.
J. B. BASSETT & CO.
PINE RIVER LOGGING & IMPROVEMENT CO.,
By C. A. SMITH, *Sec'y.*

Indorsed: Filed July 3rd, 1900. Henry D. Lang, clerk.

Operator.	Location.	Feet. No. of feet green.	Feet. No. of feet stump burnt.	Feet. No. of feet dead.	Total. Total No. of feet cut.	No. of trees. No. of green trees.	No. of trees. No. of stump burnt trees not dead.	No. of trees. No. of dead trees.	Total. Total No. trees.	Total. Total State scale (614,250).
Wm. Fairbanks	(1.) Miss. river	448,642	113,878	178,027	740,547	691	208	507	1,406	Camp 1
	Winnebigoshish lake	1,102,333	146,055	497,511	1,745,899	2,022	346	1,022	3,390	Camp 2
	Cass river	1,796,220	219,617	476,316	2,492,153	2,223	283	681	3,187	Camp 3
	Little L. Winnebigoshish.	19,284	.....	.....	19,284	30	...	.....	30	Boom logs
Lyons & Wakefield	Miss. river	462,814	44,151	42,522	549,487	584	78	54	716	450,910
	Little L. Winnebigoshish.	98,490	19,502	39,031	157,023	187	34	68	289	150,940
	Cass river	972,313	124,505	183,395	1,280,813	893	114	187	1,194	852,930
Schocagesis & Galbreath	(2.) Cut Foot Sioux	1,274,395	389,853	543,051	2,207,305	2,243	530	1,026	3,799	
Charles Losh	(3.) Miss. & West B. C. lake.	2,129,527	470,505	732,696	3,332,728	2,916	852	1,037	4,805	
	East Ball Club lake	497,366	54,842	156,074	708,282	674	90	276	1,040	
Lydick & Drumbeater	(1*a*.) White Oak lake.	603,822	None.	56,285	660,107	764	None.	61	825	
Lydick & Iabense	(1*b*.) Cass river	2,184,120	908,000	307,773	3,399,893	4,215	1,634	1,756	7,605	
John Tuttle	(4.) L. Winnebigoshish	887,667	415,816	761,000	2,064,483	1,521	713	1,304	3,538	1,828,600
W. & P. Bonga	(5.) Leech lake	640,567	417,590	249,409	1,317,566	1,055	678	475	2,208	978,190
Jack Bonga	(5*a*.) Leech river	162,932	48,423	1,616	212,971	220	70	4	294	1,050,100
	6 Mile lake	364,902	107,952	607,329	1,080,183	385	105	700	1,190	1,050,100
Clark Clay	L. Winnebigoshish	37,237	9,760 (Cut & not removed)	.....	46,997	52	18 (Not removed)	.....	70	

CUT AND NOT REMOVED.

		16,000	5,000	51,000	Estimated
Lydick & Drumbeater	White Oak lake	30,000		18	Scaled
Clark Clay	L. Winnebigoshish	9,760			Estimated
W. & P. Bonga	Leech lake	450,000			

2823.

133 PLAINTIFF'S EXHIBIT E 1.

No. 911.

Time-check.

MARCH 5TH, 1892.

Maj. B. P. Schuler, U. S. Indian agent, please pay to J. Corchee for work at Ia Bance Co. camp No. 1.

Two mos. 11 days, at $26 per mo.....	$63.00
Less cash paid.....	
" Wanigan acc't.....	7.60
Bal. due.....	$55.40

O. K.
H. A. McALLISTER.

his
W. FAIRBANKS. x
mark.
IA BANCE & CO., *Contractor*.
GEO. LYDICK, *Foreman*.

Witnesses:
JOHN TAPLEY.
JOHN E. MILDAL.

Received payment,

JAKOB CORCHER.

Not good if bearing more than one endorsement besides drawee. Not good unless O. K'd by J. E. Mildal.

Exhibits "E" 2 to "E" 86 consist of time-checks similar in form to the above, but differing in dates, months, names, etc.

PLAINTIFF'S EXHIBIT F 1.

J. S. Pillsbury. C. A. Smith & Co. C. A. Smith.

Manufacturers and dealers in lumber, rooms 315 and 318 Lumber exchange.

MINNEAPOLIS, MINN., *Feb.* 15, 1892.

F. P. Sheldon, cash., Grand Rapids.

DEAR SIR: We will gladly honor any and all time-checks properly made out, as far as there is any money due the Indians under our contracts.

All time-checks must be signed by the contractor, countersigned by the foreman, O. K'd by either H. A. McAllister or Arno Mereen, and also by J. E. Mildal, ag't. If contractor does not write his mark must be witnessed by two signatures. We will discount any such time when paid by us as above at the rate of 10 % p'r annum to April 15th.

Resp'y yours, C. A. SMITH & CO.

134 PLAINTIFF'S EXHIBIT F 2.

P. J. S. Pillsbury. C. A. Smith & Co. C. A. Smith.

Manufacturers and dealers in lumber, rooms 315 and 318 Lumber exchange.

MINNEAPOLIS, MINN., *Mar.* 1, 1892.

F. P. Sheldon, cashier.

DEAR SIR: We enclose our check No. 17502 for $59.50 as per your letter of 18th ult. enclosing time order No. 551 for Ind. logg. operations. We have delayed remittance for several days expecting advice from camp in regular order, but have not heard from them. However, as the order appears in good order and form, we will not keep you out of your money any longer.

Yours resp., C. A. SMITH & CO.

PLAINTIFF'S EXHIBIT F 3.

J. S. Pillsbury. C. A. Smith & Co. C. A. Smith.

Manufacturers and dealers in lumber, rooms 315 and 318 Lumber exchange

MINNEAPOLIS, MINN., *Mar.* 28, 1892.

F. P. Sheldon, cashier, L'b'rmen's bank, Grand Rapids, Minn.

D'R SIR: Your favor of the 24th inst. with enclosures is at hand. We enclose to you our check No. 17765 on First nat'l bank for $93.62 in payment of orders $84.91 dis. 79 % $93.62.

J. E. Meldal's checks are good—his bank ac. here is protected by us.

Yours resp., C. A. SMITH & CO.,
P'r ANDERSON.

Indorsed: Filed July 5th, 1900. Henry D. Lang, clerk.

DEFENDANTS' EXHIBIT "3."

C. A. Smith & Co., lumber, lath & shingles.

MINNEAPOLIS, MINN., *April* 20, 1892.

The First national bank

Pay to the order of B. P. Shuler, U. S. Ind. agent,
Seventeen thousand nine hund. fifty-eight 65—dollars $17,958.65.
C. A. SMITH & CO.

135 (Stamped across face of check:) Paid C. R. Apr. 23, 1892. First nat'l bank, Minneapolis, Minn.

(Indorsed.)

Pay to the order of cashier First National Bank of Detroit, Minn. B. P. Shuler, U. S. Indian agent.

Pay First National Bank, of St. Paul, Minn., or order for account of the First Nat'l Bank, of Detroit, Minn. O. D. Brown, cashier.

Pay First national bank, or order, for collection, account of First national bank, St. Paul, Minn. E. H. Bailey, cashier.

Filed July 5th, 1900. Henry D. Lang, clerk, by Louise B. Trott, deputy.

DEFENDANTS' EXHIBIT "4."

MINNEAPOLIS, *April* 20, 1892. No. 2000.

B. B. Bassett & Co.

Pay to the order of F. C. Gerhard $3,061.15 three thousand sixty-one and $\frac{15}{100}$ dollars.

To First national bank, Minneapolis.

J. B. BASSETT & CO.
(W. L. B.)

(Stamped across face of check:) Paid C. R. Apr. 23, 1892. First nat'l bank, Minneapolis, Minn.

(Indorsed.)

Pay to B. P. Shuler, Indian agent. F. C. Gerhard. B. P. Shuler, U. S. Indian ag't.

Pay First National Bank, of St. Paul, Minn., or order, for account of the First Nat'l Bank, of Detroit, Minn. O. D. Brown, cashier.

Pay First national bank, or order, for collection, account of First nat'l bank, St. Paul, Minn. E. H. Bailey, cashier.

Filed July 5th, 1900. Henry D. Lang, clerk.

DEFENDANTS' EXHIBIT "5."

United States Indian service, White Earth agency, Minn.

APRIL 20, 1892.

Received of Pine River Logging & Improvement Co. seventeen thousand nine hundred fifty-eight $\frac{65}{100}$ dollars balance due on all their contracts for logs cut on the Leech Lake, White Oak Point & Winnibagoshish Indian reservations during the season of 1891 & '92 this being in full for all demands under said contracts.

B. P. SHULER,
U. S. Indian Ag't.

Indorsed: Filed July 5th, 1900. Henry D. Lang, clerk.

136 DEFENDANTS' EXHIBIT "6."

United States Indian service, White Earth agency, Minn.

APRIL 20, 1892.

Received of J. B. Bassett & Co. three thousand and sixty-one $\frac{15}{100}$ dollars balance due on all their contracts for logs cut on the Leech Lake, White Oak Point and Winnibagoshish Indian reservation during the season of 1891 & '92, this being in full for all demands under said contracts.

B. P. SHULER,
U. S. Indian Ag't.

Indorsed: Filed July 5th, 1900. Henry D. Lang, clerk.

DEFENDANTS' EXHIBIT "7."

Names of contractors.	No. of logs.	No. of feet.	Price per M.	Total value of logs.	Stumpage 10%.	Scalage. ½	Scalage. ½	Am't paid contractors.	Contractor's receipt.		Witness. Witness.
W. Fairbanks.7 30/100.	61,750	8,424,820	4.50	37,911.69	3,791.12	210.63	210.63	26,073.35	11,838.34		Pete... 489.72
Losh, B. C....6 63/100.	7,517	1,132,970	4.25	4,815.12	481.50	80.25	80.25	9,732.38	4,429.28		Jack... 320.17
" Miss.....7 1/2...	15,541	2,077,010	4.50	9,346.54	934.65						809.89
John Tuttle....6 1/5...	11,350	1,828,600	4.00	7,314.40	731.45	45.72	45.72	5,959.97	1,354.43		
							336.60		17,958.65	C. Smith.	
Schocag.....8 4/5...	17,051	2,108,570	4.00	8,434.28	843.40	52.70	52.70	6,671.58	1,762.70		
Bonga Bros....6 7/10..	13,568	2,028,290	4.00	8,113.16	811.32	50.70	50.70	7,728.00	862.02		
Av.....7 2/10..	126,767	17,600,265	.....	75,935.19	.....	103.40	.....	56,165.28	2,624.72		
									103.40		
									2,728.12	Bassett.	2,728.12
											333.03
											3,061.15
											17,958.65
									20,686.77		21,019.80

Indorsed: Filed July 5th, 1900. Henry D. Lang, clerk.

138 DEFENDANTS' EXHIBIT 12.

(*Telegram.*)

Dated WASHINGTON, 3, 16, 1893.

To Pine River Logging and Impr't Co., c/o C. A. Smith & Co., Mpls., Minn.:

Have accepted bond offered by you in lieu *in* logs cut under contract with certain Chippewa Indians, which logs were seized and held by the Government special agent. Warriner has been directed to release the logs.

M. M. ROSE,
Act'g Commis.

Indorsed: Filed Sept. 21st, 1900. Henry D. Lang, clerk. By Louise B. Trott, deputy.

DEFENDANTS' EXHIBIT 13.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
GRAND RAPIDS, MINN., *March* 18, 1893.

To C. A. Smith, Esq., sec. Pine River Logging & Imp. Co., Minneapolis, Minn.

DEAR SIR: I am in receipt this day of the following instructions by telegraph from the honorable Commissioner of the Gen. Land Office, dated Washington, D. C., March 16, 1893.

"Bonds have been accepted in lieu of logs seized by (—) which were cut by Chippewa Indians under contracts with Pine River Logging and Improvement Co. and J. B. Bassett & Co. Release the logs to said parties * * *."

Therefore, in compliance with said instructions, the said logs are released to you, subject to provisions contained in bonds in lieu thereof.

Please acknowledge receipt hereof by return mail, and oblige

Yours respectfully, J. O. WARRINER,
Special Ag't G. L. O.

Indorsed: Filed Sept. 21st, 1900. Henry D. Lang, clerk. By Louise B. Trott, deputy.

DEFENDANTS' EXHIBIT 16.

UNITED STATES INDIAN SERVICE,
WHITE EARTH AGENCY, MINN., *April* 20, 1892.

S. S. Brown, surv. gen'l 2nd dist. Minn.

Please transfer to J. B. Bassett & Co. the following log marks viz. * **R** | **J** and stamp marks **R** and **J**.

B. P. SHULER,
U. S. Indian Ag't.

Recorded April 23, '92 in Book H of Records fol. 611.

139 SURVEYOR GENERAL'S OFFICE,
Minneapolis, Minnesota.

I hereby certify that the within order to transfer marks was filed for record on the 23 day of April, A. D. 1892, and was duly recorded in Book H of Records, on page 611.

S. S. BROWN,
Surveyor General 2d Dist. Minn.,
By SINCLAIR, *Deputy.*

Indorsed: Filed July 5th, 1900. Henry D. Lang, clerk.

DEFENDANTS' EXHIBIT "17."

UNITED STATES INDIAN SERVICE,
WHITE EARTH AGENCY, MINN., *April* 20, 1892.

S. S. Brown, surv. gen'l 2nd dist. Minn.:

Please transfer to Pine River Logging & Improvement Co. the following bark marks viz. **E. A.: E/B H/T J◊NX** and stamp marks **L CAS TP** and **Æ**.

B. P. SHULER,
U. S. Indian Ag't.

Recorded April 21, '92 in Book H of Records, fol. 610.

SURVEYOR GENERAL'S OFFICE,
Minneapolis, Minnesota.

I hereby certify that the within order to transfer log marks was filed for record on the 21st day of April, A. D. 1892 and was duly recorded in Book H of Records, on page 610.

S. S. BROWN,
Surveyor General 2d Dist. Minn.,
By SINCLAIR, *Deputy.*

Indorsed: Filed July 5th, 1900. Henry D. Lang, clerk. By Louise B. Trott, deputy.

Indorsed: Bill of exceptions. Filed August 22nd, 1900. Henry D. Lang, clerk.

And on the same day the following assignment of errors was filed of record in said cause, to wit:

United States Circuit Court of Appeals, Eighth Circuit.

United States Circuit Court, District of Minnesota, Third Division.

UNITED STATES OF AMERICA, Plaintiff,
vs.
PINE RIVER LOGGING & IMPROVEMENT COMPANY, a Corporation; Joel B. Bassett and William L. Bassett, Copartners as J. B. Bassett & Company, and John S. Pillsbury and Charles A. Smith, Copartners as C. A. Smith & Company, Defendants.

Assignment of Errors.

Now come the defendants above named, by John B. Atwater, their attorney, and for their assignments of error herein state
140 that the trial court erred, and that in the record and proceedings in said court in the above-entitled action, and also in the giving of judgment therein in favor of said plaintiff and against said defendants, there are manifest errors, as follows, to wit:

I.

The court erred in overruling defendants' objection to the following question put by plaintiff's counsel to plaintiff's witness, I-Ah-Bance, to wit: "Were you paid by the owner; did you get any profit out of the work that winter?" Defendants' counsel objected to this question as immaterial, incompetent and irrelevant, which objection was by the court overruled, and defendants duly excepted.

II.

The court erred in overruling defendants' objection to the following question asked by plaintiff's counsel of the plaintiff's witness, Edward L. Warren, on his direct examination, after he had testified that on a visit to Scho-cag-e-sic's camp, he had a conversation with Mr. Galbraith, who was in charge of the camp, with reference to the trees they were cutting. The said question was as follows: "What was the conversation?" This question was objected to by defendants as incompetent and immaterial; the objection was overruled by the court, and defendants duly excepted.

III.

The court also erred in sustaining plaintiff's objection to the question asked by defendants' counsel of Charles A. Smith, on his direct examination, as follows, to wit: "Was anything said by the Indians who saw you as to the amount of dead timber on the reservation that winter?" This question was objected to by plaintiff as incompetent and immaterial, the objection was sustained by the court, and defendants duly excepted.

IV.

The court also erred in sustaining plaintiff's objection to defendants' offer to prove, in connection with the examination of said

witness, Charles A. Smith. It having been shown that, prior to the making of the logging contracts in this action, said Smith had had a conversation with certain of the Indians named in these contracts, defendants offered to prove by the witness that at this meeting and conversation between Mr. Smith and these Indians, the Indians informed him that there was a large amount of dead and down timber on the reservation, which could be cut. Plaintiff's counsel objected to this offer as incompetent and immaterial, the objection was sustained, and defendants duly excepted.

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V.

The court also erred in sustaining plaintiff's objection to the introduction in evidence *to* Defendants' Exhibit 12. This was a telegram dated March 16th, 1893, from the United States acting Commissioner of the Land Office to the Pine River Logging & Improvement Company, and was in the following words: "Have accepted bond offered by you in lieu of logs cut under contract with certain Chippewa Indians, which logs were seized and held by the Government. Special Agent Warriner has been directed to release the logs." Plaintiff's counsel objected to said exhibit as incompetent, immaterial and irrelevant, which objection was sustained, and defendants duly excepted.

VI.

The court also erred in sustaining plaintiff's objection to the introduction in evidence of Defendants' Ex. 13. This was a letter dated March 18th, 1893, from the said Warriner to Charles A. Smith, notifying him of the receipt of a telegram similar to the one specified in the last assignment of error, and notifying him of the release of the logs. Plaintiff's counsel objected to this evidence as incompetent, immaterial and irrelevant, which objection was sustained, and defendants duly excepted.

VII.

The court also erred in sustaining plaintiff's objection to the following question asked by the defendants' counsel of defendants' witness Charles A. Smith, on direct examination, as regards a body or bunch of timber where the largest percentage of trees was absolutely dead or so injured that it would die within a comparatively short time. The question was as follows: "As regards such a bunch of timber as mentioned in your last answer, what was the meaning of the term 'dead timber,' as generally and commonly used in the State of Minnesota by lumbermen, with reference to lumbering and logging operations?" Plaintiff's counsel objected to this question as incompetent, irrelevant and immaterial. Said objection was sustained upon the statement of defendants' counsel that the question was not asked for the purpose of showing the intent of the parties, but as bearing upon the legal construction of the contract. To this ruling of the court, defendants duly excepted.

VIII.

The court also erred in sustaining the objection of plaintiff's counsel to the offer of proof made by defendants' counsel im-
142 mediately after the ruling of the court mentioned in the last assignment of error. Defendants offered to prove by this witness that at the time these contracts were entered into and for many years prior thereto, the term "dead and down timber," as generally and commonly used in the State of Minnesota, by lumbermen, with reference to lumbering and logging operations and logging contracts, was understood to mean and was used as meaning a bunch or body of pine trees the great proportion of which had been injured by fire so that they were dead or would die within a short time, although a small proportion of the trees scattered through the bunch were practically uninjured by the fire. At the time of making this offer, counsel on behalf of the defendants state to the court that the offer is not made for the purpose of showing intent, but as bearing upon the legal interpretation of the contract. Counsel for plaintiff objects to the offer as immaterial, incompetent and irrelevant. The court sustains the objection and counsel for defendants excepts to the ruling.

IX.

The court also erred in granting the motion of plaintiff's counsel to instruct the jury to return a verdict in favor of the plaintiff against the defendants for the sum of $88,269.94, which motion was granted by the court, and to the granting of which motion defendants duly excepted.

X.

The court also erred in charging the jury, after stating that the amount due plaintiff was $88,269.94, as follows, to wit: "You will see, gentlemen of the jury, that all the issues which would have been proper for your determination have been eliminated from the case by the stipulation of the counsel representing the Government, and it therefore becomes my duty as a matter of law, to direct you to return a verdict for the amount last named." To the giving of these instructions the counsel for defendants duly excepted.

XI.

The court also erred in rendering and entering judgment for the plaintiff against defendants' exception for said sum of $88,269.94 with costs and disbursements.

XII.

The trial court also erred in rendering and entering judgment for any costs in this action and in overruling defendants' objections to each and every item of costs proposed to be taxed for the
143 general reasons set out in defendants' objections that the United States was not entitled to tax any costs whatever against these defendants.

XIII.

The trial court also erred in rendering and entering judgment against defendants' objection to the following item of costs in its proposed statement of costs, to wit: Reporter's fees for record second trial for appeal, $356.69; and in overruling defendants' objections to said item of costs for the reason that under the United States statutes the fees of a stenographer for furnishing a copy of the evidence to be used in preparing the bill of exceptions on appeal is not taxable in the trial court.

Wherefore, the defendants pray that a writ of error be granted to the United States circuit court for the district of Minnesota, third division, in the above-entitled cause that the judgment of said circuit court may be reversed, set aside and held for naught; that this cause be remanded for further proceedings therein, according to law, and for such other and further order and judgment as in justice plaintiff may be entitled.

Dated August 22nd, A. D. 1900.

(Signed) J. B. ATWATER,
Attorney for Defendants.

Indorsed: "Filed August 22nd, 1900. Henry D. Lang, clerk."

Thereafter on the same day the following bond on appeal was filed of record in said cause, to wit:

United States Circuit Court of Appeals, Eighth Circuit.

United States Circuit Court, District of Minnesota, Third Division.

UNITED STATES OF AMERICA, Plaintiff,
vs.
PINE RIVER LOGGING & IMPROVEMENT COMPANY, Corporation; Joel B. Bassett and William L. Bassett, Copartners as J. B. Bassett & Company, and John S. Pillsbury and Charles A. Smith, Copartners as C. A. Smith & Company, Defendants.

Know all men by these presents, that we, The Pine River Logging & Improvement Company, and C. A. Smith and John S Pillsbury, late partners as C. A. Smith & Company, and Joel B. Bassett and William L. Bassett, late partners as J. B. Bassett & Company, as principals, and A. R. Rogers, as surety, all of Hennepin
144 county, Minnesota, are held and firmly bound unto The United States, plaintiff in the above-entitled action, in the full and just sum of one hundred fifteen thousand dollars ($115,000.00) to be paid to the said United States, its successors and assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals, and dated this 9th day of August, A. D. 1900.

Whereas, lately at the June term of the United States circuit court,

district of Minnesota, third division, in a suit depending in said court between The United States, plaintiff, and The Pine River Logging & Improvement Company, Charles A. Smith and John S. Pillsbury, partners as C. A. Smith & Company, and J. B. Bassett and William L. Bassett, partners as J. B. Bassett & Company, defendants, a judgment was rendered on July 6th, A. D. 1900, against the said defendants, for the sum of eighty-eight thousand two hundred sixty-nine and $\frac{94}{100}$ dollars ($88,269.94), together with costs, and the said defendants are about to obtain a writ of error of the United States circuit court of appeals for the eighth circuit to reverse the judgment in the aforesaid suit and also a citation directed to the said United States, citing and admonishing it to be and appear in the United States circuit court of appeals for the eighth circuit at the city of St. Louis, Missouri, sixty days from and after the date of said citation.

Now, the condition of the above obligation is such that if the said defendants shall prosecute said writ of error to effect, and answer all damages and costs if they fail to make good their plea, then the above obligation to be void, else to remain in full force and virtue.

PINE RIVER LOGGING & IMPROVEMENT CO.,
By O. L. LUNDBERG, *Pres.* [SEAL.]
C. A. SMITH, *Sec'y.* [SEAL.]
CHARLES A. SMITH. [SEAL.]
WILLIAM L. BASSETT. [SEAL.]
J. B. BASSETT & CO., [SEAL.]
By WM. L. BASSETT. [SEAL.]
JOHN S. PILLSBURY. [SEAL.]
A. R. ROGERS. [SEAL.]

{ Pine River Logging & Improvement Co. Corporate Seal, Elbow Lake, Minn. }

In presence of—
JOHN B. ATWATER.
ALFRED F. HILL.

STATE OF MINNESOTA, }
County of Hennepin, } ss:

On this 9th day of August, A. D. 1900, before me personally appeared O. L. Lundberg and C. A. Smith, to me personally known, who being duly sworn did say that he, the said O. L. Lundberg was the president and he, the said C. A. Smith, was the secretary
145 of the Pine River Logging & Improvement Company; that the seal affixed to said instrument was the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its board of directors, and they acknowledged said instrument to be the free act and deed of said corporation.

[NOTARIAL SEAL.] ALFRED L. HILL,
Notary Public, Hennepin Co., Minnesota.

STATE OF MINNESOTA, } ss:
County of Hennepin, }

On this 9th day of August, A. D. 1900, before me personally appeared Chas. A. Smith, Wm. L. Bassett and Arthur R. Rogers, and they duly acknowledged that they executed the foregoing instrument as their free act and deed; and said Wm. L. Bassett acknowledged that he executed the same as the free act and deed of J. B. Bassett & Co.

[NOTARIAL SEAL.] ALFRED L. HILL,
Notary Public, Hennepin County, Minnesota.

STATE OF MINNESOTA, } ss:
County of Hennepin, }

On this 10th day of August, A. D. 1900, before me personally appeared John S. Pillsbury, and duly acknowledged that he executed the foregoing instrument as his free act and deed.

[NOTARIAL SEAL.] L. P. HUBBARD,
Notary Public, Hennepin County, Minnesota.

STATE OF MINNESOTA, } ss:
County of Hennepin, }

A. R. Rogers, being duly sworn, doth say for himself that he is one of the sureties above named; that he is a resident and freeholder of Hennepin county, Minnesota, and worth the amount of one hundred, fifteen thousand dollars ($115,000.00) specified in foregoing bond, above his debts and liabilities, exclusive of his property exempt from execution.

A. R. ROGERS.

Subscribed and sworn to before me this 9th day of August, A. D. 1900.

[NOTARIAL SEAL.] ALFRED L. HILL,
Notary Public, Hennepin County, Minnesota.

I hereby approve the within bond as a supersedeas bond in the above-entitled action.

Aug. 21st, 1900.

CHARLES F. AMIDON, *Judge.*

Indorsed: "Bond on appeal. Filed Aug. 22, 1900. Henry D. Lang, clerk."

146 And on the same day the following petition for writ of error was filed and entered of record in said cause, to wit:

United States Circuit Court, District of Minnesota, Third Division.

UNITED STATES OF AMERICA, Plaintiff,
vs.
PINE RIVER LOGGING & IMPROVEMENT COMPANY, a Corporation; Joel B. Bassett and William L. Bassett, Copartners as J. B. Bassett & Company, and John S. Pillsbury and Charles A. Smith, Copartners as C. A. Smith & Company, Defendants.

Petition for Writ of Error.

To the United States circuit court of appeals for the eighth circuit and to the judges thereof, and to the circuit court of the United States for the district of Minnesota and the judges thereof:

The petition of the defendants above named respectfully represents that at a regular term of the United States circuit court for the district of Minnesota, third division, begun and holden at St. Paul in said district on the fourth Tuesday in June, 1900, the plaintiff above named recovered judgment against your petitioners, the defendants above named, on July 6th, 1900, for the sum of $88,269.94, damages, together with costs.

And your petitioners say that they are aggrieved by the said judgment of the said circuit court, and that manifest error appears in the proceedings of the said circuit court to the great damage of your petitioners.

Wherefore, your petitioners pray that a writ of error may issue out of and under the seal of the said circuit court of appeals, or of the said circuit court, directed to the United States circuit court for the district of Minnesota, third division, and to the judges thereof, to the end that the said judgment of the said circuit court may be reviewed by the said circuit court of appeals, and that the said errors may be corrected by the said circuit court of appeals; and your petitioners pray that said judgment of the said circuit court may be reversed.

(Signed) J. B. ATWATER,
Attorney for Petitioners and Defendants.

Indorsed: "Petition for writ of error and prayer for reversal. Filed Aug. 22, 1900. Henry D. Lang, clerk."

And thereafter on the same day the following order for writ of error was filed and entered in said cause, to wit:

147 United States Circuit Court, (State) of Minnesota, Third Division.

UNITED STATES OF AMERICA, Plaintiff,
vs.
PINE RIVER LOGGING & IMPROVEMENT CO., a Corporation; Joel B. Bassett and William L. Bassett, Copartners as J. B. Bassett & Co., and John S. Pillsbury and Charles A. Smith, Copartners as C. A. Smith & Co., Defendants.

The defendants in the above-entitled action having filed in this court their bill of exceptions, duly allowed, and their supersedeas bond, duly approved, and a petition praying that a writ of error issue from the circuit court of appeals for the eighth circuit, directed to the United States circuit court, district of Minnesota, third division, to reverse the judgment heretofore entered in the above-entitled court on July 6th, A. D. 1900, in favor of plaintiff above named and against the defendants above named, for the sum of $88,269.94, together with costs and disbursements,

It is hereby ordered, that the prayer of said petition be granted, and that a writ of error be issued, as prayed for.

Dated Aug. 23, A. D. 1900.

(Signed) CHARLES F. AMIDON, *Judge.*

Indorsed: "Order allowing writ of error. Filed Aug. 22nd, 1900. Henry D. Lang, clerk."

And on the same day the following writ of error was duly issued in said cause, to wit:

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the circuit court of the United States for the district of Minnesota, third division, Greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, at the June term, 1900, thereof, between United States of America, plaintiff, and Pine River Logging and Improvement Co. *et al.*, defendants, a manifest error hath happened, to the great damage of the said Pine River Logging and Improvement Co. *et al.*, as by their complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals for the eighth circuit, together with this writ, so that you have the said record and proceedings aforesaid at the city of St. Louis, Missouri, and filed in the office of the clerk of the United States circuit court of appeals, for the eighth circuit, on or before the 27th day of Octo-

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ber, 1900, to the end that the record and proceedings aforesaid being inspected, the United States circuit court of appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 28th day of August, A. D. 1900. Issued at office in St. Paul, Minnesota, with the seal of the circuit court of the United States for the district of Minnesota, third division.

Seal U. S. Circuit Court, Dist. of Minnesota, Third Division.

HENRY D. LANG,
Clerk of the Circuit Court of the United States of America for District of Minnesota.

Allowed by—
CHARLES F. AMIDON, *Judge.*

UNITED STATES OF AMERICA, } ss:
District of Minnesota, Third Division, }

In obedience to the command of the within writ, I herewith transmit to the United States circuit court of appeals, a duly certified transcript of the record and proceedings in the within-entitled cause, with all things concerning the same.

In witness whereof, I hereto subscribe my name and affix the seal of the circuit court of the United States for the district of Minnesota, third division.

Seal U. S. Circuit Court, Dist. of Minnesota, Third Division.

HENRY D. LANG,
Clerk of the Circuit Court of the United States of America for District of Minnesota.

Entered 1263. E. law. Filed August 28th, 1900. Henry D. Lang, clerk.

Thereafter and on the 28th day of August, the following citation was filed and entered in said cause, with the proof of service thereon, to wit:

UNITED STATES OF AMERICA:

To the United States of America, Greeting:

You are hereby cited and admonished to be and appear in the United States circuit court of appeals for the eighth circuit
149 at the city of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to a writ of error filed in the clerk's office of the United States circuit court for the district of Minnesota, wherein The Pine River Logging & Improvement Co., a corporation, Joel B. Bassett and William L. Bassett & Co., copartners as J. B. Bassett & Co., and John S. Pillsbury and Charles A. Smith copartners as C. A. Smith & Co., are plaintiffs in error, and you are defendant in error, to show cause, if any there (*by*), why the judg-

ment entered against said plaintiff- in error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Charles F. Amidon, judge of the United States district court for the district of North Dakota, this 28th day of August, A. D. 1900.

CHARLES F. AMIDON, *Judge.*

Service of the within citation, by copy at St. Paul, this 31st day of August, A. D. 1900, is hereby admitted.

JOHN E. STRYKER,
Attorney for Defendant in Error.

Entered 1263. E. law. Filed August 28th, 1900. Henry D. Lang, clerk.

UNITED STATES OF AMERICA.

Circuit Court of the United States, District of Minnesota, Third Division.

I, Henry D. Lang, clerk of said circuit court, do hereby certify and return to the honorable, the United States circuit court of appeals for the eighth circuit, that the foregoing, consisting of 226 pages, numbered consecutively from 1 to 226 inclusive, is a true and complete transcript of the records, process, pleadings, orders, final judgment and all other proceedings in said cause, and of the whole thereof, as appears from the original records and files of said court; and I do further certify and return, that I have annexed to said transcript, and included within said paging, the original citation, together with the proof of service thereof.

Seal U. S. Circuit Court, Dist. of Minnesota, Third Division.

In witness whereof, I have hereunto set my hand, and affixed the seal of said court, at Saint Paul, in the district of Minnesota, this 20th day of September, A. D. 1900.

HENRY D. LANG, *Clerk.*

Filed Sep. 29, 1900.

JOHN D. JORDAN, *Clerk.*

150 (*Appearance for the Plaintiffs in Error.*)

And on the twenty-ninth day of September, A. D. 1900, an appearance of counsel for plaintiffs in error was filed in the clerk's office of said circuit court of appeals, in said cause, in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit.

THE PINE RIVER LOGGING AND IMPROVEMENT COMPANY *et al.*, Plaintiffs in Error,
vs.
THE UNITED STATES. } No. 1494.

The clerk will enter my appearance as counsel for the plaintiffs in error.

JOHN B. ATWATER,
EUGENE G. HAY,
WILLIAM H. BENNETT,
Of Counsel.

(Endorsed:) U. S. circuit court of appeals, eighth circuit. No. 1494. The Pine River Logging and Improvement Company, *et al.*, pl'ffs in error, *vs.* The United States. Appearance. Filed Sep. 29, 1900. John D. Jordan, clerk. John B. Atwater, Eugene G. Hay, William H. Bennett, counsel for pl'ffs in error.

(*Appearance for Defendant in Error.*)

And on the twentieth day of October, A. D. 1900, an appearance of counsel for defendant in error was filed in the clerk's office of said circuit court of appeals, in said cause, in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit.

PINE RIVER LOGGING & IMPROVEMENT COMPANY ET AL., Plaintiffs in Error,
vs.
UNITED STATES OF AMERICA, Defendant in Error.

151 John D. Jordan, Esq., clerk of said court:

Please enter my appearance as attorney for the defendant in error in the above-entitled case.

Yours respectfully, JOHN E. STRYKER,
Attorney for Defendant in Error.

(Endorsed:) No. 1494. Pine River Logging and Improvement Co., pl'ff in error, *vs.* United States of America. Appearance. Filed Oct. 20, 1900. John D. Jordan, clerk. John E. Stryker, counsel for def't in error.

(*Order of Submission.*)

And on the seventeenth day of December, A. D. 1900, in the record of the proceedings of said circuit court of appeals is an order of submission in said cause, in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1900.

MONDAY, *December* 17, 1900.

THE PINE RIVER LOGGING & IMPROVEMENT COMPANY *et al.*, Plaintiffs in Error,
vs.
THE UNITED STATES OF AMERICA. } No. 1494.

In error to the circuit court of the United States for the district of Minnesota.

This cause having been advanced and called for hearing this day, argument was commenced by Mr. John B. Atwater in behalf of the plaintiffs in error; continued by Mr. John E. Stryker for the defendant in error and concluded by Mr. John B. Atwater for the plaintiffs in error.

Thereupon the cause was submitted to the court upon the transcript of record from said circuit court and the briefs of counsel filed herein.

152 (*Judgment.*)

And on the seventeenth day of December, A. D. 1900, in the record of the proceedings of said circuit court of appeals is a judgment, in said cause, in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1900.

MONDAY, *December* 17, 1900.

THE PINE RIVER LOGGING AND IMPROVEMENT Company, a Corporation; Joel B. Bassett and William L. Bassett and Company, Copartners as J. B. Bassett and Company, and John S. Pillsbury and Charles A. Smith, Copartners as C. A. Smith and Company, Plaintiffs in Error,
vs.
THE UNITED STATES OF AMERICA. } No. 1494. In Error to the Circuit Court of the United States for the District of Minnesota.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Minnesota, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said circuit court, in this cause, be, and the same is hereby, affirmed without costs to either party in this court.

December 17, 1900.

(*Petition for Writ of Error.*)

And on the twenty-fifth day of January, A. D. 1901, a petition for writ of error was filed in the clerk's office of said circuit court of appeals, in said cause, in the words and figures following, to wit:

153 UNITED STATES OF AMERICA, *Supreme Court.*

United States Circuit Court of Appeals, Eighth Circuit.

PINE RIVER LOGGING & IMPROVEMENT CO., a Corporation; Joel B. Bassett and William L. Bassett, Copartners as J. B. Bassett & Co., and John S. Pillsbury and Charles A. Smith, Copartners as C. A. Smith & Co., Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA, Defendant in Error.

Petition for Writ of Error.

To the United States Supreme Court and to the honorable justices thereof:

The petition of the plaintiffs in error above named respectfully represents that at a regular term of the United States circuit court for the district of Minnesota, third division, begun and holden at St. Paul in said district on the fourth Tuesday in June, 1900, the defendant in error above named recovered judgment against said petitioners, the plaintiffs in error above named, on July 6, 1900, for the sum of $88,269.94 damages, together with costs.

That your petitioners thereafter sued out of the United States circuit court of appeals for the eighth circuit a writ of error to said judgment rendered in the circuit court, and on December 17, A. D. 1900, judgment was duly rendered and entered in said circuit court of appeals, in all things affirming the judgment of said circuit court.

And your petitioners say that they are aggrieved by the said judgment of said circuit court and by the said judgment of said circuit court of appeals; and that manifest error appears in the proceedings of the said circuit court and in the proceedings of said circuit court of appeals, to the great damage of your petitioners.

154 Wherefore, your petitioners pray that a writ of error may issue out of and under the seal of the Supreme Court of the United States, directed to the United States circuit court of appeals and to the judges thereof, to the end that the judgment of said circuit court of appeals and the judgment of said circuit court may be reviewed by the United States Supreme Court, and that the said errors may be corrected by the said Supreme Court.

And your petitioners pray that said judgment of said circuit court of appeals and of said circuit court may be reversed.

RALPH WHELAN,
Attorney for Petitioners and Plaintiffs in Error.

(Endorsed:) No. 1494. United States circuit court of appeals. Eighth circuit. Pine River Logging & Improvement Co., *et al.*, plaintiffs in error, *vs.* United States of America, defendant in error. Petition for writ of error. Filed Jan. 25, 1901. John D. Jordan, clerk.

(*Assignment of Errors.*)

And on the twenty-fifth day of January, A. D. 1901, an assignment of errors was filed in the clerk's office of said circuit court of appeals, in said cause, in the words and figures following, to wit:

UNITED STATES OF AMERICA, *Supreme Court.*

United States Circuit Court of Appeals, Eighth Circuit.

PINE RIVER LOGGING & IMPROVEMENT Co., a Corporation; Joel B. Bassett and William L. Bassett, Copartners as J. B. Bassett & Co., and John S. Pillsbury and Charles A. Smith, Copartners as C. A. Smith & Co., Plaintiffs in Error, *vs.* UNITED STATES OF AMERICA, Defendant in Error. } Assignment of Errors.

Afterwards, to wit on the — day of January, A. D. 1901, before the justices of the Supreme Court at the Capitol in the city of Washington, D. C., come the plaintiffs in error above named, by
155 Ralph Whelan, Esq., their attorney, and say that in the record and proceedings in the above-entitled action there is manifest error; and said plaintiffs in error do herewith present and file this, their assignment of errors, to wit:

I. The circuit court erred in overruling defendants' objection to the following question put by plaintiff's counsel to plaintiff's witness, I-Ah-Bance, to wit: "Were you paid by the owner; did you get any profit out of the work that winter?" Defendants' counsel objected to this question as immaterial, incompetent and irrelevant, which objection was by the court overruled, and defendants duly excepted. The answer of the witness to this question was, "No, sir; I did not."

II. The circuit court erred in overruling defendants' objection to the following question asked by plaintiff's counsel of the plaintiff's witness, Edward L. Warren, on his direct examination, after he had testified that on a visit to Scho-cag-e-sic's camp, he had a conversation with Mr. Galbraith, who was in charge of the camp, with reference to the trees they were cutting. The said question was as fol-

lows: "What was the conversation?" This question was objected to by defendants as incompetent and immaterial; the objection was overruled by the court, and defendants duly excepted. The answer of the witness to this question was, "I said to Mr. Galbraith that they were cutting—I says, 'You are cutting green timber here.' He says, 'I know it.' And I says, 'You will get in trouble if you ain't careful.' He says, 'There is others cutting.' He says, 'I don't see any reason why I shouldn't cut some.' I think those were the words."

III. The circuit court also erred in sustaining plaintiff's objection to the question asked by defendants' counsel of Charles A. Smith, on his direct examination, as follows, to wit: "Was anything said by the Indians who saw you as to the amount of dead timber on the reservation that winter?" This question was objected to by plaintiff as incompetent and immaterial, the objection was sustained by the court, and the defendants duly excepted.

IV. The circuit court also erred in sustaining plaintiff's objection to defendants' offer to prove, in connection with the exami-
156 nation of said witness, Charles A. Smith. It having been shown that, prior to the making of the logging contracts in this action, said Smith had had a conversation with certain of the Indians named in these contracts, defendants offered to prove by the witness that at this meeting and conversation between Mr. Smith and these Indians, the Indians informed him that there was a large amount of dead and down timber on the reservation, which could be cut. Plaintiff's counsel objected to this offer as incompetent and immaterial, the objection was sustained, and defendants duly excepted.

V. The circuit court also erred in sustaining plaintiff's objection to the introduction in evidence of Defendants' Exhibit 12. This was a telegram dated March 16th, 1893, from the United States acting Commissioner of the Land Office to the Pine River Logging & Improvement Company, and was in the following words: "Have accepted bond offered by you in lieu of logs cut under contract with certain Chippewa Indians, which logs were seized and held by the Government. Special Agent Warriner has been directed to release the logs." Plaintiff's counsel objected to said exhibit as incompetent, immaterial and irrelevant, which objection was sustained, and defendants duly excepted.

VI. The circuit court also erred in sustaining plaintiff's objection to the introduction in evidence of Defendants' Exhibit 13. This was a letter dated March 18th, 1893, from the said Warriner to Charles A. Smith, notifying him of the receipt of a telegram similar to the one specified in the last assignment of error, and notifying him of the release of the logs. Plaintiff's counsel objected to this evidence as incompetent, immaterial and irrelevant, which objection was sustained, and defendants duly excepted.

VII. The circuit court also erred in sustaining plaintiff's objection to the following question asked by defendants' counsel of defendants' witness, Charles A. Smith, on direct examination, as regards a body or bunch of timber where the largest percentage of

trees was absolutely dead or so injured that they would die within a comparatively short time. The question was as follows:

157 "As regards such a bunch of timber as mentioned in your last answer, what was the meaning of the term 'dead timber,' as generally and commonly used in the State of Minnesota by lumbermen, with reference to lumbering and logging operations?" Plaintiff's counsel objected to this question as incompetent, irrelevant and immaterial. Said objection was sustained upon the statement of defendants' counsel that the question was not used for the purpose of showing the intent of the parties, but as bearing upon the legal construction of the contract. To this ruling of the court, defendants duly excepted.

VIII. The circuit court also erred in sustaining the objection of plaintiff's counsel to the offer of proof made by defendants' counsel immediately after the ruling of the court mentioned in the last assignment of error. Defendants offered to prove by this witness that at the time these contracts were entered into and for many years prior thereto, the term "dead and down timber," as generally and commonly used in the State of Minnesota, by lumbermen, with reference to lumbering and logging operations and logging contracts, was understood to mean and was used as meaning a bunch or body of pine trees the great proportion of which had been injured by fire so that they were dead or would die within a short time, although a small proportion of the trees scattered through the bunch were practically uninjured by the fire. At the time of making this offer, counsel on behalf of the defendants state- to the court that the offer *is* not made for the purpose of showing intent, but as bearing upon the legal interpretation of the contract. Counsel for plaintiff objects to the offer as immaterial, incompetent and irrelevant. The court sustains the objection and counsel for defendants excepts to the ruling.

IX. The circuit court also erred in granting the motion of plaintiff's counsel to instruct the jury to return a verdict in favor of the plaintiff against the defendants for the sum of $88,269.94, which motion was granted by the court, and to the granting of which motion defendants duly excepted.

X. The circuit court also erred in charging the jury, after stating that the amount due plaintiff was $88,269.94, as follows, to wit:

158 "You will see, gentlemen of the jury, that all the issues which would have been proper for your determination have been eliminated from the case by the stipulation of the counsel representing the Government, and it therefore becomes my duty as a matter of law, to direct you to return a verdict for the amount last named." To the giving of these instructions the counsel for defendants duly excepted.

XI. The circuit court also erred in rendering and entering judgment for the plaintiff against defendants' exception for said sum of $88,269.94, with costs and disbursements.

XII. The circuit court also erred in rendering and entering judgment for any costs in this action and in overruling defendants' objections to each and every item of costs proposed to be taxed for the

general reasons set out in defendants' objections that the United States was not entitled to tax any costs whatever against these defendants.

XIII. The circuit court also erred in rendering and entering judgment against the defendants' objection to the following item of costs in its proposed statement of costs, to wit: Reporter's fees for record second trial for appeal, $356.69; and in overruling defendants' objections to said item of costs, for the reason that under the United States statutes the fees of a stenographer for furnishing a copy of the evidence to be used in preparing the bill of exceptions on appeal is not taxable in the trial court.

XIV. The circuit court also erred in granting the motion of plaintiff's counsel to instruct the jury to render a verdict in favor of the plaintiff against the defendants for the sum of $88,269.94, for the following reasons, to wit:

(*a.*) That defendants were entitled to go to the jury upon the question as to whether, under all the circumstances of the case, the taking of all timber in excess of the contract amount was a conversion of all such timber.

(*b.*) That defendants were entitled to go to the jury as to what was a reasonable variation from the stated amount of 2,750,000 feet to which plaintiffs would be entitled by virtue of the words "about" and "more or less."

(*c.*) That defendants were entitled to go to the jury upon the question that they were entitled to have the amount paid to the
159 United States for the stumpage of the timber offset against any amount that the United States might recover against defendants.

(*d.*) That defendants were entitled to go to the jury upon the question as to whether the United States was entitled to sue defendants for a conversion of the timber without a return of the amount paid for stumpage.

(*e.*) That defendants were entitled to go to the jury on the question of the good faith of the conversion for the purpose of reducing the plaintiff's recovery from the log value of the timber to its stumpage value.

XV. That the circuit court of appeals erred in rendering a judgment affirming the judgment of said circuit court, on account of each and all of the errors hereinbefore specifically assigned.

XVI. The circuit court of appeals also erred in not sustaining the assignment of error of plaintiffs in error in that court calling in question the action of the trial court in granting the motion of counsel for the United States to instruct the jury to return a verdict in favor of the United States against the defendants in that court for the sum of $88,269.94, which motion was granted by the trial court, and to the granting of which motion defendants in that court duly excepted.

XVII. The circuit court of appeals also erred in not sustaining the assignment of error of plaintiffs in error in that court to the charge of the circuit court to the jury, as follows, to wit: Said circuit court, after stating that the amount due the United States was $88,269.94,

charged the jury as follows: "You will see, gentlemen of the jury, that all the issues which would have been proper for your determination have been eliminated from the case by the stipulation of the counsel representing the Government, and it therefore becomes my duty, as a matter of law, to direct you to return a verdict for the amount last named." To the giving of this instruction, counsel for defendants in the trial court duly excepted.

XVIII. The circuit court of appeals also erred in not sustaining the assignment of error of the plaintiffs in error in said court, which alleged as error the rendition and entry of said judgment in favor of the United States for the sum of $88,269.94.

160 XIX. The circuit court of appeals also erred in not sustaining the assignment of error of plaintiffs in error in that court, which alleged as error the taxation of any costs in favor of the United States.

XX. The circuit court of appeals also erred in not sustaining the assignment of error of plaintiffs in error in that court, which assignment alleged as error the taxation of the sum of $356.69 for reporter's fees.

Wherefore, the plaintiffs in error in said circuit court of appeals pray that a writ of error be granted by the Supreme Court of the United States to said circuit court of appeals in the above-entitled cause that the judgment of said circuit court of appeals and of said circuit court may be reversed, set aside and held for naught; that this cause be remanded for further proceeding therein, according to law; and for such other and further order and judgment as in justice plaintiffs in error may be entitled.

Dated January 14, A. D. 1901.

RALPH WHELAN,
Attorney for Plaintiffs in Error.

(Endorsed:) No. 1494. United States circuit court of appeals Eighth circuit. Pine River Logging & Improvement Co., *et al.*, plaintiffs in error, *vs.* United States of America, defendant in error. Assignment of errors. Filed Jan. 25, 1901. John D. Jordan, clerk.

(*Bond on Writ of Error.*)

And on the twenty-fifth day of January, A. D. 1901, a bond on writ of error was filed in the clerk's office of said circuit court of appeals, in said cause, in the words and figures following, to wit:

UNITED STATES OF AMERICA,
Supreme Court.

United States Circuit Court of Appeals, Eighth Circuit.

161 PINE RIVER LOGGING & IMPROVEMENT CO., a Corporation; Joel B. Bassett and William L. Bassett, Copartners as J. B. Bassett & Co., and John S. Pillsbury and Charles A. Smith, Copartners as C. A. Smith & Co., Plaintiffs in Error,
vs.
UNITED STATES OF AMERICA, Defendant in Error.

Know all men by these presents, that we, The Pine River Logging & Improvement Co., and C. A. Smith and John S. Pillsbury, late partners as C. A. Smith & Co., and Joel B. Bassett and William L. Bassett, late partners as J. B. Bassett & Co., as principals, and A. R. Rogers, as surety, all of Hennepin county, Minnesota, are held and firmly bound unto The United States, defendant in error in the above-entitled action, in the full and just sum of one hundred and twenty thousand dollars ($120,000), to be paid to the said United States, its successors and assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators and successors, jointly and severally by these presents.

Sealed with our seals and dated this 9th day of January, A. D. 1901.

Whereas lately at the June term of the United States circuit court, district of Minnesota, third division, in a suit depending in said court between The United States, plaintiff, and The Pine River Logging & Improvement Company, Charles A. Smith and John S. Pillsbury, partners as C. A. Smith & Company, and J. B. Bassett and William L. Bassett, partners as J. B. Bassett & Company, defendants, a judgment was rendered on July 6th, A. D. 1900, against the said defendants, for the sum of eighty-eight thousand, two hundred sixty-nine and $\frac{94}{100}$ dollars ($88,269.94), together with costs;

And whereas, lately, at the December, 1900, term of the United States circuit court of appeals for the eighth circuit, upon a writ of error to said judgment prosecuted by the principals in this bond, said judgment of said circuit court was, on December 17, 1900, in all respects affirmed by said circuit court of appeals;

162 And whereas the said plaintiffs in error in said circuit court of appeals are about to apply for a writ of error from the United States Supreme Court to reverse the said judgments in said circuit court of appeals and in said circuit court, and also a citation directed to the said United States, citing and admonishing it to be and appear in said United States Supreme Court at the city of Washington, District of Columbia, at such time as may be fixed in said citation;

Now, the condition of the above obligation is such that if the said plaintiffs shall prosecute said writ of error to effect, and answer all

damages and costs if they fail to make good their plea, then the above obligation to be void, else to remain in full force and virtue.

PINE RIVER LOGGING & IMPROVEMENT CO., [SEAL.]
By O. L. LUNDBERG, *Pres.* [SEAL.]
C. A. SMITH, *Sec'y.* [SEAL.]
[SEAL.] CHARLES A. SMITH. [SEAL.]
JOHN S. PILLSBURY. [SEAL.]
WILLIAM L. BASSETT. [SEAL.]
J. B. BASSETT & CO., [SEAL.]
By W. L. BASSETT. [SEAL.]
ARTHUR R. ROGERS. [SEAL.]

In presence of
E. C. GARRIGUES.
JOHN B. ATWATER.

(50-cent documentary stamp cancelled.)

STATE OF MINNESOTA, } ss:
County of Hennepin, }

On this 12th day of January, A. D. 1901, before me personally appeared O. L. Lundberg and C. A. Smith, to me personally known, who being duly sworn did say that he, the said O. L. Lundberg, was the president, and he, the said C. A. Smith, was the secretary of the Pine River Logging & Improvement Company; that the seal affixed to said instrument was the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its board of directors, and they acknowledged said instrument to be the free act and deed of said corporation.

EDWIN C. GARRIGUES,
[SEAL.] *Notary Public, Hennepin County, Minnesota.*

163 STATE OF MINNESOTA, } ss:
County of Hennepin, }

On this 12th day of January, A. D. 1901, before me personally appeared Charles A. Smith, William L. Bassett and Arthur R. Rogers, and they duly acknowledged that they executed the foregoing instrument as their free act and deed; and said William L. Bassett acknowledged that he executed the same as the free act and deed of J. B. Bassett & Co.

EDWIN C. GARRIGUES,
[SEAL.] *Notary Public, Hennepin County, Minnesota.*

STATE OF MINNESOTA, } ss:
County of Hennepin, }

On this 14th day of January, A. D. 1901, before me personally appeared John S. Pillsbury, and duly acknowledged that he executed the foregoing instrument as his free act and deed.

L. P. HUBBARD,
[SEAL.] *Notary Public, Hennepin County, Minnesota.*

STATE OF MINNESOTA, } ss:
County of Hennepin, }

A. R. Rogers being duly sworn, doth say for himself that he is one of the sureties above named; that he is a resident and freeholder of Hennepin county, Minnesota, and worth the amount of one hundred and twenty thousand dollars ($120,000) specified in the foregoing bond, above his debts and liabilities, exclusive of his property exempt from execution.

ARTHUR R. ROGERS.

Subscribed and sworn to before me this 12th day of January, A. D. 1901.

EDWIN C. GARRIGUES,
[SEAL.] *Notary Public, Hennepin County, Minnesota.*

164 I hereby approve the within bond as a supersedeas bond in the above-entitled action.

DAVID J. BREWER,
Associate Justice of the Supreme Court U. S.

Dated January 19th, 1901.

(Endorsed:) No. 1494. United States of America, Supreme Court. U. S. circuit court of appeals, eighth circuit. Pine River Logging & Improvement Co., *et al.*, plaintiffs in error, *vs.* United States of America, defendant in error. Bond on writ of error Filed Jan. 25, 1901. John D. Jordan, clerk.

(*Order Allowing Writ of Error, etc.*)

And on the twenty-fifth day of January, A. D. 1901, an order allowing writ of error, etc., was filed in the clerk's office of said circuit court of appeals, in said cause, in the words and figures following, to wit:

UNITED STATES OF AMERICA, }
Supreme Court. }

United States Circuit Court of Appeals, Eighth Circuit.

PINE RIVER LOGGING & IMPROVEMENT CO., a Corporation; JOEL B. BASSETT and WILLIAM L. BASSETT, Copartners as J. B. Bassett & Co., and JOHN S. PILLSBURY and CHARLES A. SMITH, Copartners as C. A. Smith & Co., Plaintiffs in Error,
vs.
UNITED STATES OF AMERICA, Defendant in Error.

On this 19th day of January, A. D. 1901, the plaintiffs in error in the above-entitled action having presented their petition for a writ of error from the Supreme Court of the United States to the United States circuit court of appeals of the eighth circuit in the above-entitled action, and also their assignment of errors, together with a supersedeas bond which has been duly approved, it is hereby
165 ordered that a writ of error in said action be allowed, as

prayed for in said petition, and that a citation to the United States be issued, in accordance with the law.

DAVID J. BREWER,
Associate Justice of the Supreme Court U. S.

(Endorsed:) No. 1494. United States circuit court of appeals. Eighth circuit. Pine River Logging & Improvement Co., *et al.*, plaintiffs in error, *vs.* United States of America, defendant in error. Order allowing writ of error, etc. Filed Jan. 25, 1901. John D. Jordan, clerk.

(*Writ of Error.*)

And on the twenty-fifth day of January, A. D. 1901, a writ of error was filed in the clerk's office of said circuit court of appeals, in said cause, in the words and figures following, to wit:

166 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the United States circuit court of appeals for the eighth circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court of appeals before you, or some of you, between Pine River Logging and Improvement Company, a corporation; Joel B. Bassett and William L. Bassett, copartners as J. B. Bassett & Co., and John S. Pillsbury and Charles A. Smith, copartners as C. A. Smith & Co., plaintiffs in error, and The United States, defendant in error, a manifest error hath happened, to the great damage of the said plaintiffs in error as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Seal of the Supreme Court of the United States.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 19th day of January, in the year of our Lord one thousand nine hundred and one.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by
DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] No. 1494. Pine River Logging and Improvement Co. *et al.*, plaintiffs in error, *vs.* The United States. Writ of error. Filed Jan. 25 1901. John D. Jordan, clerk.

Return to Writ.

UNITED STATES OF AMERICA, } ss:
Eighth Circuit, }

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

Seal United States Circuit Court of Appeals, Eighth Circuit.

In witness whereof, I hereto subscribe my name and affix the seal of the United States circuit court of appeals for the eighth circuit at office in the city of St. Louis, Missouri, this first day of February, A. D. 1901.

JOHN D. JORDAN,
Clerk of United States Circuit Court of Appeals for the Eighth Circuit.

167 (*Citation.*)

And on the thirty-first day of January, A. D. 1901, a citation was filed in the clerk's office of said circuit court of appeals, in said cause, the original of which with admission of service thereon, is hereto attached and herewith returned.

168 UNITED STATES OF AMERICA, ss:

To the United States, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the United States circuit court of appeals for the eighth circuit wherein Pine River Logging and Improvement Company, a corporation, Joel B. Bassett and William L. Bassett copartners as J. B. Bassett & Co., and John S. Pillsbury and Charles A. Smith, copartners as C. A. Smith & Co., are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable David J. Brewer, associate justice of the Supreme Court of the United States, this 19th day of January, in the year of our Lord one thousand nine hundred and one.

DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

Due service of the within citation by delivery of a copy thereof is hereby admitted on behalf of the United States, at St. Paul, Minn., this 29th day of January, A. D. 1901.

JOHN E. STRYKER,
Special Assistant U. S. Att'y.

[Endorsed:] No. — Supreme Court of the United States. Pine River Logging and Improvement Co., *et al.* plaintiffs in error, *vs.* The United States. Original citation. Filed Jan. 31 1901 John D. Jordan, clerk.

169 (*Clerk's Certificate.*)

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, clerk of the United States circuit court of appeals for the eighth circuit, do hereby certify that the foregoing one hundred sixty-eight pages contain full, true and complete copies of all the pleadings, proceedings and record entries, in a certain cause wherein The Pine River Logging and Improvement Company, *et al.*, were plaintiffs in error, and The United States of America was defendant in error, No. 1494, December term, 1900, as full, true and complete as the same remain on file and of record in my office.

I do further certify that the original citation with admission of service thereon and the original writ of error with my return thereto are hereto attached and herewith returned.

Seal United States Circuit Court of Appeals, Eighth Circuit.

In testimony whereof, I hereunto subscribe my name and affix the seal of said United States circuit court of appeals for the eighth circuit, at the city of St. Louis, Missouri, this first day of February, A. D. 1901.

JOHN D. JORDAN,
Clerk of United States Circuit Court of Appeals for the Eighth Circuit.

Endorsed on cover: File No. 18051. U. S. C. C. of appeals—8th circuit. Term No. 250 The Pine River Logging and Improvement Company *et al.* plaintiffs in error, *vs.* The United States. Filed February 11, 1901.

No. 250.

APR 23 1902
JAMES H. McKENNEY,
Clerk

Brf. of Worthington for P. E.

Supreme Court of the United States.

OCTOBER TERM, 1901.

Filed April 23, 1902.

No. 250.

THE PINE RIVER LOGGING AND IMPROVEMENT COMPANY, A CORPORATION; JOEL B. BASSETT AND WILLIAM L. BASSETT, COPARTNERS AS J. B. BASSETT AND COMPANY, AND JOHN S. PILLSBURY AND CHARLES A. SMITH, COPARTNERS AS C. A. SMITH AND COMPANY, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES OF AMERICA.

BRIEF FOR PLAINTIFFS IN ERROR.

ALSO COPIES OF TWO OPINIONS BY THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT ON FORMER HEARINGS OF THE CASE IN THAT COURT.

A. S. WORTHINGTON,
Attorney for Plaintiffs in Error.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 2755

Supreme Court of the United States

OCTOBER TERM, 1901.

No. 250.

THE PINE RIVER LOGGING AND IMPROVEMENT COMPANY, A CORPORATION; JOEL B. BASSETT AND WILLIAM L. BASSETT, COPARTNERS AS J. B. BASSETT AND COMPANY, AND JOHN S. PILLSBURY AND CHARLES A. SMITH, COPARTNERS AS C. A. SMITH AND COMPANY, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES OF AMERICA.

BRIEF FOR THE PLAINTIFFS IN ERROR.

STATEMENT OF THE CASE.

The writ of error in this case is brought to review a judgment of the circuit court of appeals for the eighth circuit, affirming a judgment of the circuit court for the district of Minnesota in favor of the United States against the plaintiffs in error for $88,269.94.

The suit was an action brought by the United States against a corporation called The Pine River Logging and Improvement Company (hereinafter called the Logging Com-

pany), and the firms of J. B. Bassett and Company and C. A. Smith and Company, to recover damages for an alleged wrongful entry by the defendants upon an Indian reservation and the cutting and removal of certain pine timber therefrom.

By an act of Congress approved February 16, 1889 (25 Stat. at Large, page 673), it was provided:

"That the President of the United States may from year to year in his discretion, under such regulations as he may prescribe, authorize the Indians residing on reservations or allotments, the fee to which remains in the United States, to fell, cut, remove, sell or otherwise dispose of the dead timber standing or fallen, on such reservation or allotment for the sole benefit of such Indian or Indians. But whenever there is reasonable cause to believe that such timber has been killed, burned, girdled, or otherwise injured for the purpose of securing its sale under this act, then in that case such authority shall not be granted."

The regulations prescribed by the President under this act will be found on pages 112 and 113 of the record. They provided, among other things, that in all cases a Government agent should "go into the woods with the loggers and superintend and direct their labors;" that the logs should be "cut and banked, or otherwise made ready for sale by the Indians under the supervision and direction of the agent;" and that 10 per cent. of the gross proceeds derived from the sale of the logs should "go to the stumpage or poor fund of the tribe, from which the old, sick, and otherwise helpless may be supported."

The first count of the complaint charges that in December, 1891, one George Lydick, with the consent and at the request of all the defendants, wrongfully entered upon lands owned by the United States which were part of an Indian reservation, and that between December 15, 1891, and April 13, 1892, Lydick wrongfully cut down a large number of trees on the land in question, which he delivered to the de-

fendants; that these logs were marked with certain specified letters and symbols; that the defendants drove and boomed the logs to Minneapolis, where they converted them into over four million feet of lumber; that the value of the lumber was over $85,000; and that the defendants did then and there convert the same to their own use (2–3).

The second, third, fourth, fifth, sixth, seventh, and eighth counts of the complaint are like the first, except that they name different persons as having cut the timber for the defendants instead of Lydick. The quantity of lumber and the value of it differs in the several counts (3–10).

The ninth and last count is like the first, except that it contains no averment that the logs were marked (10).

The Logging Company, J. B. Bassett and Company, and C. A. Smith and Company filed separate answers. The answer of the Logging Company admitted that under contracts entered into by it under the act of February 16, 1889, with the Indians named in the first, second, third, fifth, and sixth counts of the complaint, and under the supervision of the United States Indian agent having charge of the reservation on which the timber was situated, the Indians named respectively cut from the reservation and delivered to the Logging Company timber to the amount specified in the answer to the respective counts (14–20). As to the fourth, seventh, and eighth counts, the Logging Company denied all the allegations contained therein, except that on information and belief it admitted that during the time specified the defendant J. B. Bassett and Company entered into contracts with certain Indians for pine timber which was cut and delivered to that firm under its contracts (20). The Logging Company denied all the allegations of the ninth count of the complaint (20). As to all the counts, the Logging Company further set up in its answer that the United States, through one J. O. Warriner, its duly authorized agent for the purpose, took possession of all the logs belonging to the Logging Company, claiming

that a portion of them had been cut from green timber; that at the same time the Government seized a large quantity of timber which had been cut and delivered to the defendant J. B. Bassett and Company; that the Logging Company and Bassett and Company had made arrangements for driving the logs which they respectively had received under their several contracts, and that thereupon a contract was entered into between the United States on the one hand and the Logging Company and J. B. Bassett on the other, a copy of which contract is annexed to the answer, which provides in substance that the defendants might drive the logs to Minneapolis without affecting the possession of the United States or the interest of any of the parties in the logs (20–23).

The answer further averred that the defendants drove the logs to Minneapolis in accordance with the last-mentioned contract, and that afterwards the Logging Company gave to the United States a bond, with sureties, in the penal sum of $75,000, which recited the foregoing facts and recited also that it was considered important by both parties that the logs should be driven to the mill and manufactured into lumber for the interest of all concerned, and provided that if the Logging Company should pay any judgment that might be rendered against it on account of the premises, the obligation should be void (21–22). It was next set up in the answer that the United States had accepted the bond in lieu of the logs and that, relying upon said acts of the complainant, the Logging Company had disposed of the logs to others. It was then again specifically set up in the answer, as to the fourth, seventh, and eighth counts of the complaint, that the claim of the United States was solely against J. B. Bassett and Company, and not against the Logging Company; that the claim set up in the first, second, third, fifth, and sixth counts was solely against the Logging Company, and that there was therefore a misjoinder of causes of action in improperly uniting in one complaint causes of action affecting

solely the Logging Company and other causes of action affecting solely the firm of J. B. Bassett and Company (22). Under the Minnesota Code this plea in abatement was properly pleaded with the defense to the merits (Wenzell's Statutes of Minnesota, 1894, sec. 5239; Page *vs.* Mitchell, 37 Minn., 368).

The answer of Bassett and Company was similar to that of the Logging Company, except that Bassett and Company admitted receiving under contracts made under the act of February 16, 1889, only the timber referred to in the fourth, seventh, and eighth counts of the complaint (27–30). As to the first, second, third, fifth, and sixth counts, Bassett and Company averred on information and belief that the Logging Company had the contracts and received the timber referred to in those counts (30). Bassett and Company, like the Logging Company, denied all the averments of the ninth count (31). Bassett and Company further averred that after the logs had been seized they entered into a contract with the United States for driving the logs which they had received to Minneapolis, without affecting the possession of the United States or the interest of either of the parties in the logs (33), and that after the logs had been taken to Minneapolis they gave to the United States a bond in the penal sum of $26,000, which recited the history of the logs and the controversy that had arisen in regard to them, and provided that it should be void if Bassett and Company should satisfy any judgment that might be obtained against them on account of the premises (35).

Smith and Company denied all the averments of the complaint referring to them, except that they admitted that the Logging Company delivered to them, to be manufactured into lumber, a certain amount of the logs described in the complaint, the value of which did not exceed $132.04. Smith and Company also set up that if the United States had any cause of action against them such cause was separate and distinct from any claim that the United States had

against any of the other defendants, and that therefore there was a misjoinder of causes of action (25–26).

The United States demurred to certain parts of the answers of Bassett and Company and the Logging Company (37–38). Though the record does not state what action was taken upon these demurrers, they must have been overruled or abandoned, because the United States subsequently replied to the several answers of the respective defendants (40–43).

In its reply, the United States admitted that the Logging Company and Bassett and Company had each, under the provisions of the act of February 16, 1889, entered into contracts with certain Indians, but averred that all the logs cut under some of the contracts and a large proportion of the logs cut under the other contracts were cut from pine trees which were alive and standing (50–52). All the contracts authorized the cutting of only "dead and down timber."

This case has been three times before the circuit court of appeals for the eighth circuit. A judgment was originally rendered in favor of the defendants upon the pleadings, on the ground apparently that the remedy of the Government was on the bonds given when the logs were surrendered to the defendants. The circuit court of appeals reversed this judgment, holding that neither of the bonds became available to the United States until a judgment had been obtained in its favor. It was also held that there was no misjoinder on the face of the complaint, because it averred that all the defendants had unlawfully received all the logs and converted them to their use. (See U. S. *vs.* Pine River Logging and Improvement Company, 78 Fed. Rep., 319.) A copy of the opinion of the court on this first appeal is appended to this brief as Appendix "A."

When the case was sent back to the circuit court there was a trial which resulted in a verdict and judgment in

favor of the defendants. The circuit court of appeals reversed this judgment also on exceptions taken by the United States at the trial. (See United States *vs.* Pine River Logging and Improvement Company *et al.*, 89 Fed. Rep., 907.) A copy of the opinion of the court on the second appeal is appended to this brief as Appendix "B."

The principal points covered by this opinion are that the contractors were limited to the quantities of timber specified in their respective contracts, with allowance only for slight variations from those quantities, and that the fact that the cutting was superintended by a Government agent did not affect the claim of the Government for any logs cut from green timber, or to logs cut from dead and down timber in substantial excess of the quantities specified.

The second trial of the case resulted in a verdict, by direction of the court, in favor of the United States for the sum of $88,269.94 (66). This result was reached (109, 110) by deducting from the total quantity of timber which the Logging Company and Bassett and Company in their answers admit was received by them under the contracts, to wit, 17,600,260 feet, the 2,750,000 feet specified in the contracts, and by fixing the price for the difference between these two sums at $4 per thousand feet, which was the lowest estimate of the value of the timber when it was seized by the Government given by any of the defendants' witnesses (107). This gave as the sum which the defendants were liable to pay the sum of $59,401.04. To this sum interest was added from May 31, 1892. There was also a judgment for costs in the sum of $5,320.66 (71).

To review the judgment entered on this verdict, the case was taken by the defendants to the circuit court of appeals, where the judgment was affirmed (136).

On this occasion the court delivered no opinion, possibly for the reason that it considered that the questions raised by the exceptions taken by the defendants at the second trial were sufficiently covered by the opinions filed in the case

when it was before the court on the former appeals; or, more probably, because the case had been before that court twice before and it was thought wise to allow it to come to this tribunal for determination of the questions involved in the former hearings.

With the petition for the allowance of a writ of error from this court to review the last judgment of the circuit court of appeals there was filed an assignment of errors (~~125~~) (128) which followed the chronological order of events at the trial. In this brief these assigned errors will be arranged in a different order, and where two or more relate to the same point they will be consolidated.

ASSIGNMENT OF ERRORS.

The circuit court of appeals erred:

I. In sustaining the action of the circuit court in instructing the jury to render a verdict for the United States in the sum of $88,269.94 (66), because this instruction required the Logging Company to pay the obligations of Bassett and Company, and required Bassett and Company to pay the obligations of the Logging Company, and required C. A. Smith and Company to pay the obligations both of the Logging Company and Bassett and Company, when there was no evidence in the case to justify the court in holding any of the parties liable for the obligations of the others, the evidence in that behalf at the most making this a question of fact for the jury.

II. In sustaining the action of the circuit court in instructing the jury to render a verdict for the United States in the sum of $88,269.94 (66), because on the evidence the court should have instructed the jury—or should at least have left it to the jury to determine the question—that under the contracts with the Logging Company and Bassett and Company on the one hand and the Indians on the other, as

those contracts had been construed and acted upon by all the parties in interest (including the United States), the Logging Company and Bassett and Company respectively had a good title to all the dead and down timber which was delivered to them by the Indians under the contracts, without regard to the specific amount of timber mentioned in the several contracts.

III. In sustaining the action of the circuit court in instructing the jury to render a verdict for the United States in the sum of $88,269.94 (66), because even if the defendants were jointly liable for all the timber cut and delivered in excess of the aggregate amount specified in the contracts, the proper measure of damages was not the value of the logs when they were seized by the Government, but the value to the Government of the timber before the Indians or the contractors by their labors had added to that value.

IV. In sustaining the action of the circuit court in instructing the jury to render said verdict, because in any event the defendants were entitled to a credit of the amount paid to the United States for stumpage on the 14,850,260 feet of timber included in the verdict (110), amounting, with interest, to about $9,500.

V. In sustaining the action of the circuit court in excluding (101) the telegram of March 16, 1893 (123), from the acting Commissioner of the General Land Office in Washington to the Logging Company at Minneapolis, in the following words:

"Have accepted bond offered by you in lieu *in* logs cut under contract with certain Chippewa Indians, which logs were seized and held by the Government special agent. Warriner has been directed to release the logs",

and in excluding (101) the letter (123) of said Warriner as special agent of the General Land Office, dated March 18,

1893, addressed to the secretary of the Logging Company, in the following words:

"DEAR SIR: I am in receipt this day of the following instructions by telegraph from the honorable Commissioner of the Gen. Land Office, dated Washington, D. C., March 16th, 1893.

"'Bonds have been accepted in lieu of logs seized by (——) which were cut by Chippewa Indians under contracts with Pine River Logging and Improvement Co. and J. B. Bassett & Co. Release the logs to said parties' * * *

"Therefore, in compliance with said instructions, the said logs are released to you, subject to provisions contained in bonds in lieu thereof.

"Please acknowledge receipt hereof by return mail, and oblige.

"Yours respectfully, J. O. WARRINER,
"*Special Ag't, G. L. O.*"

VI. In sustaining the action of the circuit court in excluding the answer of the witness Charles A. Smith, on his direct examination as a witness on behalf of the defendants, to the question "Was anything said by the Indians who saw you as to the amount of dead timber on the reservation that winter?" and in ruling out the evidence offered by the defendants through said Smith, in answer to said question, that he had had a conversation with certain of the Indians named in those contracts, and that the Indians informed him that there was a large amount of dead and down timber on the reservation that could be cut (98–99).

VII. In sustaining the action of the circuit court in permitting the witness I-Ah-Bance, over the objection of the defendants' counsel, to testify in answer to the question, "Were you paid by the owner; did you get any profit out of the work that winter?" that he did not (85).

VIII. In sustaining the action of the circuit court in permitting the plaintiff's witness, Edward L. Warren, on his

direct examination, after he had said that on a visit to the camp of one of the Indian contractors he had a conversation with Mr. Galbraith with reference to the trees they were cutting, to testify over the objection of the defendants' counsel, and in reply to the question, "What was the conversation?" as follows:

"I said to Mr. Galbraith that they were cutting—I says, 'You are cutting green timber here.' He says, 'I know it;' and I says, 'You will get in trouble if you ain't careful.' He says, 'There is others cutting.' He says, 'I don't see any reason why I shouldn't cut some.' I think those are the words" (87).

IX. In sustaining the action of the circuit court in excluding on plaintiff's objection an answer by the defendants' witness, Charles A. Smith, to the following question:

"As regards such a bunch of timber as mentioned in your last answer, what was the meaning of the term 'dead timber,' as generally and commonly used in the State of Minnesota by lumbermen with reference to lumbering and logging operations?"

And in excluding the evidence offered by the defendants in the same connection by the same witness, that at the time the contracts between the respective defendants and the Indians involved in this suit were entered into, and for many years prior thereto, the term "dead and down" timber, as generally and commonly used in the State of Minnesota by lumbermen with reference to lumbering and logging operations and logging contracts, was understood to mean and was used as meaning a bunch or body of pine trees the great proportion of which had been injured by fire, so that they were dead or would die within a short time, although a small proportion of the trees scattered through the bunch were practically uninjured by fire (103, 104).

X. In sustaining the action of the circuit court in enter-

ing judgment against the defendants for costs in the sum of $5,320.66 (76, 77).

XI. In affirming the judgment of the circuit court and in not reversing the same and directing a new trial.

ARGUMENT.

I.

The judgment should be reversed because it requires the Logging Company to pay the obligations of Bassett and Company, and requires the firm of Bassett and Company to pay the obligations of the Logging Company, and requires C. A. Smith and Company to pay the obligations both of the Logging Company and Bassett and Company.

Copies of the contracts of the Logging Company and Bassett and Company with the Indians were filed in the court below as exhibits to the reply of the United States to the respective answers of the Logging Company and of Bassett and Company (45–47–53–57). It will be seen that the Logging Company entered into contracts with three Indians, and Bassett and Company entered into similar contracts with two other Indians. Each contract provided that the logs cut under it should have a certain bark-mark and a certain stamp mark or marks, both the bark-marks and the stamp-marks provided for by the Logging Company's contracts being entirely different from those specified by the Bassett and Company contracts.

As has been seen, in the complaint no reference is made to the contracts, and all the defendants are charged with having employed each of the Indians named in the several counts and having received all the timber that was cut; but in their answers both the Logging Company and Bassett

and Company set up their respective contracts, and each of them averred that it had nothing to do with the contracts of the other (20–30).

The firm of Smith and Company in their answer denied all the allegations of the complaint, except that it admitted that the Logging Company had delivered to it some of the logs, which Smith and Company had manufactured into lumber and disposed of in the ordinary course of business, the lumber so disposed of being worth not more than $132.84 (25).

The facts in the case indicate that from the beginning all the parties treated these contracts as they appeared to be on their face, separate and distinct from one another. It is true that by an instrument, the date of which nowhere appears, the Logging Company and Bassett and Company employed Clark Clay to take all the logs landed under these contracts and drive them "below Brainerd dam" (115, 116), but, as the marks upon the logs necessarily indicated to whom each log belonged, there was nothing in this contract, it is submitted, which would justify the Government in treating the Logging Company as in possession of the logs of Bassett and Company and liable therefor, and Bassett and Company as being in possession of the logs of the Logging Company and liable therefor. Indeed, there was no evidence that the logs of the several owners were mingled together.

When the final settlement with the Indians was made, the amounts due each of the Indians who had entered into contracts with the Logging Company, and of the two Indians who had entered into contracts with Bassett and Company, were kept separate and distinct from each other, the amount due under the Logging Company's contracts being ascertained to be $17,958.65, and the amount due under the Bassett and Company contracts being $3,061.15 (122). Bassett and Company drew their check for this sum of $3,061.15 to the order of F. C. Gerhardt, who was in their employ (104), and Gerhardt indorsed it over to Shuler, the Indian agent, who

collected it (120) and gave Bassett and Company his receipt therefor (121). The Logging Company paid to Shuler the balance due from it of $17,958.65 and received his receipt therefor (120). On the same day that these payments were made Shuler, as the Indian agent of the United States, directed the surveyor general of the second Minnesota district to transfer to Bassett and Company the log-marks which designated the logs belonging to Bassett and Company, and to the Logging Company the bark-marks and stamp-marks designating the logs belonging to it (123, 124).

When the logs were finally surrendered by the United States to the defendants for the purpose of having them manufactured into lumber, the Logging Company and Bassett and Company each gave to the United States a separate bond, the bond of Bassett and Company being in the penal sum of $26,000 (35), while the bond given by the Logging Company was in the penal sum of $75,000 (21). The bond given by Bassett and Company recited, among other things, that that firm "did, in the year 1891, enter into divers contracts with sundry Indians of the Chippewa nation;" that certain logs had been cut by the Indians named in said contracts, and that there had arisen between the United States and Bassett and Company a controversy regarding the logs. The condition of this bond is that if Bassett and Company shall "pay or cause to be paid, or satisfy or cause to be satisfied to the United States of America any judgment that may be rendered against the above-named principal (Bassett and Company) in any form of action or suit which may be brought by the United States against said above-named principal *on account of the premises hereinbefore recited*," the obligation should be void (35, 36). The entire bond given by the Logging Company does not appear in the case *verbatim*, but all that is material in it is set forth in the answer of the Logging Company (21, 22) as is expressly admitted by the reply of the United States to that answer (44). This bond is in the same form as that of

Bassett and Company. By it the Logging Company was to pay any judgment that might be obtained against it by the United States "*on account of the premises hereinbefore recited,*" and the premises refer only to the Logging Company's contracts and not to those of Bassett and Company.

From this review of the admitted facts it is apparent that from the time the contracts were originally entered into by the Logging Company and Bassett and Company respectively until the logs were finally released by the Government after their seizure, the parties understood that certain of the logs were the property of the Logging Company and certain others were the property of Bassett and Company.

As to C. A. Smith and Company, William L. Bassett of the firm of Bassett and Company testified that "the logs cut under the contracts were equally divided between C. A. Smith and Company and J. B. Bassett and Company, and not according to the amounts named in the contracts" (108). Charles A. Smith, of the firm of Smith and Company, was also secretary of the Logging Company (96). And Smith and Company in some respects acted as the financial agents of the Logging Company in paying the Indians and in the final payment of $17,958.65 to the U. S. Indian agent (118, 119). All this indicated intimate relations between the three defendants, but it was far from being sufficient to justify the court in holding *as matter of law* that each of the parties was responsible for all the acts of the others in relation to these contracts.

II.

The court should have instructed the jury—or should, at least, have left it to the jury to determine the question—that under the contracts between the Logging Company and Bassett and Company, respectively, on the one hand, and the Indians, on the other, as those contracts had been construed and acted upon by all parties in interest, including the United States, the Logging Company and Bassett and Company, respectively, had a good title to all the dead and down timber which was delivered to them by the Indians under the contracts, without regard to the specific quantity of timber mentioned in the several contracts.

By the contract between the Logging Company and the Indian, William Fairbanks, the latter agreed to cut, haul, and deliver "*about* five hundred thousand feet of pine saw-logs, to be cut on the Indian reservation from dead and down timber" (53). The other contracts to which the Logging Company was a party used the same phraseology, the number of feet of logs only being different (55–57). By the contract between Bassett and Company and the Indian, Scho-Cag-e-Sic, the latter agreed to cut, haul, and deliver "two hundred and fifty thousand feet, *more or less*, of pine saw-logs, to be cut on the Indian reservation from dead and down timber" (45). Their contract with the Bongas contains the same language (47).

It is settled in this court that the words "more or less" or "about," when used in relation to a quantity of goods or articles to be delivered under a contract, will, under some circumstances, be held to limit the quantity to "slight and unimportant" differences between the amount delivered and the amount specified by the contract, but that under other circumstances they may practically neutralize the words specifying exact quantities. Thus, in Norrington *vs.* Wright, 115 U. S., 188, it was held that under a contract

to ship *about* one thousand tons of iron rails per month during a certain period the sellers were bound, during that period, to ship approximately one thousand tons each month; while in Brawley *vs.* U. S., 96 U. S., 168, it was held that a contract by which the Government agreed to purchase 880 cords of wood, more or less, was satisfied by the purchase of only forty cords, because other parts of the contract indicated that it was to be left to the post commander at the place of purchase to determine how many cords would be required.

This court has also repeatedly held that where both of the parties to a contract by their subsequent conduct have given it a construction different from that which the law might have given it the courts will adopt that construction. In Steinbach *vs.* Stewart, 11 Wall., 576; Insurance Company *vs.* Dutcher, 95 U. S., 273; Topliff *vs.* Topliff, 122 U. S., 131; and Lake Shore R. Co. *vs.* Prentiss, 147 U. S., 99, this was expressly determined.

In Chicago *vs.* Sheldon, 9 Wall., 54, the court said: "In an executory contract and when its execution necessarily involves a practical construction, if the minds of both parties concur there can be no great danger in the adoption of it by the court as the true one."

Perhaps the strongest case in this connection is the District of Columbia *vs.* Gallaher, 124 U. S., 505. In that case Gallaher had entered into a contract to build a large sewer in Washington in accordance with certain plans and specifications. An apparent departure from the plans was made which resulted in the board of audit, before which the contractor's accounts came for settlement, deducting from the amount due him under the contract the sum of over $35,000. The contractor brought suit in the Court of Claims to recover this sum, and obtained a judgment in his favor, which was affirmed by this court, the ground of the decision in favor of the claimant being thus stated by Mr. Justice Matthews, who delivered the opinion:

"The work as actually done was done under the direction and supervision of the District engineer and was performed in accordance with the plan and sample which was supposed and understood to be what was required by the contract, and to be paid for at the contract price. We think that the practical construction which the parties put upon the terms of their own contract, and according to which the work was done, must prevail over the literal meaning of the contract, according to which the defendant seeks to obtain a deduction in the contract price."

In the present case the statute under which the cutting was done; the correspondence between the Secretary of the Interior and the President on the subject; the regulations which the President adopted for carrying the act into effect; and the conduct of all the parties concerned in these particular contracts, and especially the conduct of the United States, tend to show that the proper construction of the contracts is that they authorized the removal of all the dead and down timber on the public land described in them.

The statute empowers the President to authorize the Indians residing on the reservation "to fell, cut, remove, sell or otherwise dispose of *the dead timber standing or fallen on such reservation.*" The several communications of the Secretary of the Interior to the President, dated respectively October 15, 1890, November 21, 1890, and November 28, 1890 (111 to 115), which seem to have been written while some of these very contracts were pending, clearly look to giving the Indians the right to appropriate for their own benefit all the dead and down timber on the reservation mentioned. These letters show that arrangements had been made to remove the Chippewa Indians from one reservation to another; that they were poor and discontented; and that to give them this privilege would be a benefit to them and would reconcile them to the removal which the Government had in contemplation. In the latest of the letters of the Secretary of the Interior to the President he said:

"I am of the opinion that the Red Lake Indians should be allowed *to cut and dispose of the dead and down timber on their ceded lands* during this season" (115). And the approval of the President endorsed upon this letter suggests that "the greatest care must be taken to *limit the cutting to dead and down timber*" (115).

The Logging Company contracts all contain the provision that the company shall pay the stipulated price per thousand feet *for all logs so cut*, without restriction to the quantities specified in another part of the contracts (53, 55, 57).

In District of Columbia *vs.* Gallaher, *supra*, the court lays great stress on the fact that the work for which compensation was claimed had been done under the direct supervision of the District engineer. The regulations adopted by the President under the act of February 16, 1889, expressly require that all the cutting shall be superintended and directed by an officer to be appointed by the Secretary of the Interior (112). In all the contracts involved in this suit the clause referring to the quantity of timber to be cut provides that the cutting shall be done "under the supervision of the United States Indian agent, or his deputies," and that the payments shall be made either to the agent or to the Indians under his supervision (4[illegible]). And as a matter of fact it is conceded here by the United States that all the work under these contracts was done under the superintendence of Tristram W. Tidd, the Government superintendent, who personally directed what timber should be cut (82). And when the timber had all been cut and a final settlement was made with the Indians, the amounts found to be due by the Logging Company and Bassett and Company, respectively, were paid directly to Shuler, the United States Indian agent (120, 121). With the contracts before him specifying the price to be paid per thousand feet to the Indians for cutting the timber, the agent, when he received the balances, knew exactly the quantity of timber that had been cut under each of the contracts. This was shown

further by the statement which was submitted to him at the time of the settlement (104, 109, 122). With this full information as to the quantity of timber that had been cut, the Indian agent not only received from the contractors in cash the balance due under the contracts, but at the same time gave to the surveyor general of the district in which the logs were situated a formal order for the transfer of the log-marks (and thereby the title to the logs) to Bassett and Company and the Logging Company, respectively (123, 124).

And even when the Commissioner of the General Land Office directed the seizure of the logs and took the other steps which led to the present litigation, he, by necessary implication, assumed that there was no objection to the quantity taken, the only controversy between him and the Logging Company and Bassett and Company being whether a part of the logs had not been cut from green timber. This is shown in many ways. The bonds which were given by the Logging Company and by Bassett and Company, when the timber was turned over to them to be manufactured into lumber, recited—

"Whereas a controversy afterwards arose between said principal and the United States, as to whether the logs so cut were cut from dead and down timber, or as to whether the same were in great part cut from green timber; and whereas *in consequence of such controversy* said logs, while in the possession of said principal, were seized" (21–35).

In considering the effect of the language in the bonds showing what, when they were given, was the only controversy between the United States and the contractors, it is important to remember that about a year before the bonds were executed and approved by the General Land Office, in Washington, the Commissioner of the General Land Office had been informed by his own agent, whom he had sent to the lands to make an investigation, that the quantity of logs cut *from dead and down timber* was from five to eight million square feet, or from two to five million

feet more than the aggregate amounts specified in the several contracts. J. O. Warriner testified at the trial, on behalf of the Government, that about April 7, 1892, he was instructed by the Commissioner of the General Land Office to make an investigation; that he made a report to the Commissioner and afterwards and about May 14 returned to the reservation, pursuant to instructions, and seized and took possession of the logs (93). With his report he had submitted to the Commissioner a schedule showing his estimate of the number of feet of green logs cut under each of the contracts, the number of feet cut from dead timber, and the number of feet cut from "stump-burnt" timber (94–117). In this statement the quantities entered under the head of "No. of feet dead" (which Warriner testified covered timber that he considered "unquestionably dead or blown down," page 93) aggregate 4,832,635 feet, or over 2,000,000 more than the aggregate amount specified in the contracts. Warriner further testified that the quantities entered under the heading "No. of feet stump burnt" included what "might possibly be considered dead timber" (93). He explains that when a fire has passed through a tract of timber a question will arise, as to many of the trees, whether they are so injured that they will die therefrom, and that this is a "matter of judgment and discretion as to which experts may differ, and often do differ" (94). The quantities in this doubtful column (excluding 9,700 feet cut and not removed) aggregate 3,480,689 feet. If we add together the quantity of logs which Warriner's statement showed had been cut from dead and down timber and the quantity which the statement showed might be included in that category the total is 8,313,324, or more than three times the aggregate number of feet specified in the contracts. It was with this information before him in writing that the Acting Commissioner of the General Land Office approved the bonds which set forth that the controversy between the United States and the contractors was whether the logs were in great part cut

from green timber, and that in consequence of *that* controversy the Government had seized the logs.

The complaint in this case is so general that it throws no light on this question. But in its answer the Logging Company stated that the United States had taken possession of the logs, "claiming that a portion of said logs so cut by said Indians was green timber, and not dead and down timber" (20). In its reply to this answer the United States admits the seizure and makes no question that the reason for the seizure is correctly set forth in the answer (52). The answer of Bassett and Company contains a similar averment (31).

It is clear, therefore, that from the making of the contracts down to the time the pleadings in this case were closed it was understood by the contractors, by the Indians, by the Government inspector who superintended the cutting, by the Indian agent who had general charge of the operation, and by the Commissioner of the General Land Office himself, that *any* dead and down timber on the land specified in the contracts might be lawfully cut by the Indians and delivered to the contractors.

There was nothing unreasonable or injurious to the Government in this view of the matter. Dead or down timber, if not utilized in some way, would rot where it stood or where it lay. It would have been a dog-in-the-manger policy for the Government to make no use of it, and at the same time keep the Indians from getting any benefit from it.

The history of the case indicates that the United States pursued these contractors under the belief that they, in collusion with the Indians and the Indian agent and his subordinates, had been taking away a vast quantity of good green timber, and that when at the first trial it was seen that this contention could not be supported as to most of the timber the representatives of the Government shifted their ground and took a position utterly inconsistent with the pleadings, the bonds, and the general course of conduct of all the parties concerned.

III.

Even if the defendants were jointly liable for all the timber cut and taken away in excess of the aggregate amount specified in the contracts, the proper measure of damages was not the value of the logs when they were seized by the Government, but the value to the Government of the timber before the Indians or the contractors by their labors had added to that value.

The measure of damages in an action in the nature of an action of trover for timber wrongfully removed from the public lands was considered by this court in Wooden Ware Company *vs.* U. S., 106 U. S., 432. In that case certain timber had been cut and removed from an Indian reservation in the State of Wisconsin. As stated in the opinion of the court, "this timber was knowingly and wrongfully taken from the land by Indians and carried by them some distance to the town of Depere and there sold to The E. E. Bolles Wooden Ware Company, the defendant, which was not chargeable with any intentional wrong, or misconduct, or bad faith in the purchase." The rule of damages under such circumstances was thoroughly presented by counsel and carefully considered and determined by the court. It was held that where the taking is the result of inadvertence and mistake, and the wrong was not intentional, the value of the timber when it was first taken must govern; that in such a case, if the conversion sued for was after value had been added to the property taken by the work of the defendant, he should be credited with the addition, and that if the taking is wrongful or willful the measure of damages is the value of the property at the time of the conversion, no allowance being made to the purchaser for the additional value which has been given to the property by his labor. It was further held that where,

as in the Wooden Ware case, the defendant was an innocent purchaser from a willful trespasser, he would be in no better position than his vendor. The present case has features which differentiate it from the Wooden Ware Company case, and perhaps from any other case that could be cited. The timber here involved was cut and taken from Government land by Indians, who were paid for their work by the defendants under contracts entered into before the cutting was begun. If that were all it might be said that the contractors themselves cut the timber on the principle that what one does by an agent he does himself; but these contracts were entered into under authority of an act of Congress, and were approved by the Secretary of the Interior, and the cutting and removing was all done under the superintendence of a Government inspector and under the general direction of the Indian agent on the spot. The money that was paid to the Indians was paid by the contractors to the Indian agent and through him disbursed to the loggers, except the 10 per cent. "stumpage" which was reserved and applied by the Government to the support of the poor of the tribe to which the loggers belonged. It is hard to see under such circumstances how any claim could reasonably be made that the cutting and removal was wrongful or willful, unless it should be charged that there was collusion between the contractors, on the one hand, and the superintendent and agent, or both, on the other. There is no suggestion anywhere in the record of any such charge, and as, in the absence of evidence to the contrary, innocence is to be presumed, the only legitimate explanation of what happened, assuming that the contracts limited the quantity of timber that might properly be taken to the quantities specified in the contracts, is that the contractors, the Indians, the superintendent, and the agent all made an honest mistake and understood the amount specified in the contracts with the qualifying words "about" or "more or less" to be simply an estimate as to the amount of

dead and down timber that was on the land described in the contracts.

If it is held that the Indians on their own account, and not merely as agents of the contractors, cut and removed the timber and sold it to the contractors, then under the doctrine of the Wooden Ware case the question would be whether the Indians acted in good faith. Whether they did or did not, the purchasers would stand in their shoes. On the other hand, if the Indians are to be construed merely as the agents of the contractors, then the question would be whether the contractors themselves acted in good faith. But, whichever view is taken of the matter, the result will be the same, because there is no evidence tending to show that either the Indians or the contractors did not act in good faith, and the fact that everything that was done was done not merely with the approval, but under the express direction of Government officers whose integrity in the matter is not assailed, would seem to be conclusive that intentional wrong-doing in the matter of the quantity of timber cut and removed is not to be imputed either to the contractors or to the Indians.

In this connection we ask the court to consider what has been said with reference to the next preceding point in the case. If what is there urged does not satisfy the court that a proper construction of the contract, in view of its language and the conduct of all the parties in interest, is that *any* dead and down timber on the lands described in the contracts might be removed, it will, we think, at least lead to the conclusion that laymen, and especially such laymen as the Indians mentioned in these contracts, might reasonably have come to the conclusion that that was what the contracts meant.

The learned judge who presided at the first trial of this case, after hearing full argument by counsel for the United States, reached the conclusion that the construction of the contracts here contended for was the correct one. It is not unreasonable to presume that the contractors, the Indians,

and the agents of the Government might honestly have understood the matter in the same way.

If the quantity of dead and down timber on the land had turned out to be materially less than that specified in the contracts, could it have been successfully contended that the contractors were entitled to have their profit on the deficiency made good to them?

In this connection it must be remembered that the question is whether the contractors, by showing their good faith in the matter, were entitled to a reduction in the measure of damages as to *any* of the timber cut in excess of the precise amount specified in the contracts. Yet it must be obvious that exact compliance to the letter with these amounts was practically impossible; and certainly no one cutting or receiving timber under like contracts and under the circumstances which surround this transaction could be accused of intentional wrong-doing in receiving from the Indians, under the approval of the Government, through its agents, a few thousand feet more than the quantities specified in the contracts.

It is submitted with great respect that the rule laid down in the Wooden Ware case should not be extended. As applied in that case, it required that there should be paid to the owner of property by one who was innocent of any wrongful act or intent in the matter, a sum far greater than the value of the property of which the plaintiff had been deprived. The modern authorities seem to lean to the doctrine that one whose property has been taken by another without fraud, force, or malice is entitled to recover only what he has lost.

In Cobbey on Replevin, section 910, it is said:

"If the original owner recover the value of his property at the time it is taken, with interest, costs and expenses, it will, in most cases, be a proper and correct measure of damages. Where a recovery of the value of property is sought in replevin, the usual measure of recovery is the value before

the property was improved by defendant's labor and skill, and this, even where it was taken knowingly and wilfully, without color or claim of right, except where such taking was accompanied by special circumstances (as malice or insult) which would justify exemplary damages, and this is to be estimated by the best means available."

So in Wells on Replevin, section 617, it is said:

"The rule has been stated with much force and clearness, as follows: When the defendant's conduct, measured by the standard of ordinary morality and care, which is the standard of the law, is not chargeable with fraud, violence, wilful negligence or wrong, the value of the property taken and converted is the measure of just compensation. If the raw material has, after appropriation and without such wrong, been changed by the manufacturer into a new species of property, as grain into whiskey, grapes into wine, furs into hats, hides into leather, or trees into lumber, the law either refuses the action or limits the recovery to the value of the original articles. But when the defendant has been guilty of any force or fraud to wrongfully deprive the plaintiff, the rule, as stated, does not apply, and the law gives the owner the entire property, without deduction for the increased value which the trespasser's labor has given it. The intention of the law in these cases is to do justice to the parties."

Indeed, the same court of appeals from which the case at bar comes to this court said, in Durant Mining Company *vs.* Percy, 93 Fed. Rep., 166, that—

"One who unintentionally and in the honest belief that he is lawfully exercising a right which he has enters upon the property of another and removes his ore, his timber, or any other valuable appurtenant to his real estate, is liable in damages for the value of the ore, timber or other thing in its original place, and for no more."

In this case the Government has recovered compensation for the logs at the rate of $4 per thousand feet—their value after the timber had been cut, hauled to the water, and

driven to Winnibegoshish lake and neighboring waters on their way to Minneapolis. There was evidence tending to show that this timber, before any value was added to it by the labors of the Indians or the defendants, was worth only from twenty-five to fifty cents per thousand feet (101). The 10 per cent. of the contract payments reserved by the Government for "stumpage" shows that the United States considered the stumpage value to be from forty to forty-five cents per thousand feet.

The defendants, therefore, after having once paid the Indians (through the United States) for the timber are now required to pay again to the United States from eight to sixteen times its value to the Government. And this in face of the fact that if the timber had not been cut under these contracts (assuming, as we must here, that it was all dead or down timber) it would in all probability have become valueless from natural decay (108, 109), and neither the Indians nor the Government would have received any benefit from it.

The court in this case is not hampered by technical rules as to the proper measure of damages growing out of the form of the action. Common-law pleading has long been abolished in Minnesota. (See Wenzell's Statutes, chapter 66, sec. 1.)

Even where the common law obtains there is a great divergence in the authorities on the question whether, in an action of trover, a defendant who has taken timber, or ore, from the land of another, under the erroneous impression that he had the right to take it, can be allowed a deduction from the value of the timber, or ore, of the added value given it by his labor. An excellent discussion of the difference, in this regard, between an action of trover and an action of trespass *quare clausum fregit* will be found in the

opinion of the court in the case of Foote *vs.* Merrill, 54 N. H., 490. That was an action of trespass to recover damages for the taking of timber from the plaintiff's land. The court said:

"It may be assumed, although it is not stated in the case, that the court instructed the jury that the plaintiff was entitled (as he manifestly was) to recover for the injury, if any, which was done to his soil, as well as 'the value of the timber after it was cut and made ready to be hauled off the land.' It is to be inferred that the court permitted the plaintiff, although he had elected to bring trespass for breaking and entering his close and cutting down and carrying away his trees, to ignore the allegation and proof of cutting, and recover the damage done by breaking and entering the close and carrying away the trees, as if the cutting had been previously done by the plaintiff himself. The plaintiff has therefore, in this form of action, recovered a verdict, which includes the value of the defendant's labor in cutting and trimming the trees. That this is not a just rule of damages is manifest, although it may be probable that but a small proportion of the amount of the verdict in this case was given for the added labor. Had the defendant set fire to the plaintiff's trees and destroyed them, the measure of damages would have been their value as they stood on the land; and we cannot say that he justly ought to pay any more for cutting and removing them than for destroying them, nor that the plaintiff justly ought to receive any more in one case than in the other. If the plaintiff by pursuing a different remedy might have availed himself of the benefit of the defendant's labor, this may afford no reason for giving it to him in the form of action he has chosen to adopt."

* * * * * *

"If the owner of timber, cut upon his land by a trespasser, gets possession of it increased in value, he has the benefit of the increased value. The law neither divests him of his property, nor requires him to pay for improvements made without his authority. Perhaps in trover, and possibly in trespass *de bonis asportatis*, he may be entitled to the same benefit. But we see no occasion for giving it to him where he brings his suit for the whole trespass of breaking and entering his close and cutting down and carrying away his

trees as a continuous act. The plaintiff is entitled to be compensated according to the magnitude of his loss. The defendant ought only to be liable to compensate him according to the magnitude of his loss. The inquiry should be, how much was the plaintiff injured by the breaking and entering of his close, and the cutting down and carrying away of his trees? *The true measure of damages is the amount of injury which the plaintiff has actually suffered from the whole trespass.* If the trees were worth no more to the plaintiff to stand than to the defendant to be cut into timber at that time, their value as timber, with the reasonable expense of cutting deducted, was the measure of the injury which was done to the plaintiff by cutting them. This is not the rule of damages which was adopted by the court. The instruction to the jury was erroneous, because it allowed the plaintiff to recover a verdict which included the value added to the timber by the defendant's labor."

The several counts of the complaint in the case at bar contain the usual averments in the common-law action of trespass *quare clausum fregit* (2nd Chitty on Pleading, 869).

There are at least two cases in which the supreme court of Minnesota, in actions growing out of facts similar to those in this case and where the complaint set forth the same averments that are to be found in the complaint in this case, has held that the proper measure of damages where the defendant has taken timber from the land of another, under the mistaken belief that he had the right to do so, is the value of the standing timber to the owner as such.

In Whitney *vs.* Huntington, 37 Minn., 197, the title to the land in question was in dispute. One of the parties to the dispute, who believed that his title was good, but who, in fact, had no title at all, cut the timber on the land, removed it, and sold it. In holding that he was liable only for the value of the logs as standing timber, the court said:

"We think no more is necessary than that the trespasser, without culpable negligence or a wilful disregard of the rights of others, shall have acted in the honest and reasonable belief that his conduct was rightful. Notice of an ad-

verse claim would be an important element to be considered; but that alone would not necessarily place the wrongdoer in the position of a culpably wilful trespasser."

The court also refers to the case of Jegon *vs.* Vivian, L. R., 6 Ch. App., 742–760, in which, upon an exactly similar state of facts, precisely the same conclusion was reached.

In King *vs.* Merriman, 38 Minn., 47, the owner of land by a written contract had authorized certain persons to enter upon it and cut and remove timber therefrom during the logging seasons of 1883–'4 and 1884–'5. The action was brought for the taking and removing of timber from the land under this contract later than the logging season of 1884–'5. At the trial the court held that the defendant could not reduce the damages by showing that in cutting the timber he acted in good faith and under the honest belief that he had the right under the contract to cut the timber after the time specified in the contract. A verdict was accordingly rendered against him for the full value of the logs; but the supreme court of Minnesota reversed the judgment entered on this verdict and held that the question whether the defendant had acted in good faith should have been submitted to the jury, and that the jury should have been instructed that if they found that he had acted in good faith he was liable only for the value of the trees as standing timber.

IV.

In any event the contractors should have been allowed credit for the amount paid to the United States for stumpage on account of the 14,850,260 feet of timber included in the verdict (110).

All the contracts bind the contractor to pay "to the United States Indian Department, or its authorized agents" 10 per cent. of the contract price as stumpage (45, 47, 53, 55, 57).

There was paid to the authorized agent of the Indian Department in cash 10 per cent. of the aggregate amount due from the contractors for all the timber that was taken (100, 119, 120, 122). The total amount paid on account of stumpage is shown in the column headed "Stumpage" in the table on page 122 to have been $7,593.44. This sum represents the stumpage on the whole 17,600,260 feet of timber taken. There are included in the verdict only 14,850,260 feet. The stumpage representing this quantity of timber would be $6,400. Adding interest from May 31, 1892, to the date of the verdict—July 3, 1900—we find that the aggregate is about $9,500.

This stumpage money the contractors paid to the United States. No part of it has ever been returned and no tender to return it or any part of it has ever been made. The United States is therefore in the position of one who, having received its own price for its timber, has obtained a judgment requiring that price to be paid to it again, and that upon a ruling which must be held to assume that the contractors who are thus required to make double payment acted in the matter in entire good faith and under the superintendence of Government officers who were also acting in good faith. We cannot think that this court will permit such an unjust result to stand.

In the brief filed in the circuit court of appeals on behalf of the United States in support of this judgment, counsel for the United States dwelt at great length on the question of the good faith of the defendants as bearing upon the measure of damages, but they based their argument on this point almost entirely upon the evidence relating to the quantity of logs that was cut from green timber—that is to say, the Government at the close of the evidence abandoned its claim that it was entitled to damages because some

green timber was cut, and obtained a verdict by the instruction of the court based solely upon the proposition that, as to the quantity of timber cut in excess of the aggregate amount specified in the contracts, the defendants were liable without regard to whether that excess was all green timber, or all dead timber, or partly one and partly the other, and then sought to maintain that verdict and the judgment entered thereon by asking the appellate court to find, what was the province of the jury alone to decide, that a large quantity of green timber was cut, and from the fact so found to infer a want of good faith, not in taking green timber, but in taking an undue quantity of dead timber. We cannot conceive that such a course can affect the judgment of this court on the questions of law which are raised by this record, as it has been made up by the trial court, following the views of the counsel for the United States. They saw no doubt that the controversy which the Government opened when it seized the logs and brought the suit had degenerated into a mere question of expert testimony as to the extent to which a tree must be injured by fire to entitle it to be classified as dead timber. The circuit court of appeals had held, when the case was before it for review after the first trial, that the position of the Government as to what constitutes dead timber was untenable. On that subject the circuit court had said:

"If the phrase 'dead timber' should be held to include only such trees as are utterly destitute of vitality in their trunks and branches, it would probably happen that much valuable timber would be lost, and that one object of the statute which is now under consideration would be frustrated by waiting for such a state of decay to be reached. In the course of a single season a tree might become to a large extent valueless for the purpose of making lumber, although at the commencement thereof it manifested considerable signs of life, and, if it had been then or previously cut, would have yielded a good quantity of lumber. In this respect the law should be given a reasonable interpretation,

having in view the purpose of the law-maker." [See page 56 of Appendix.]

If the Government at this late day wishes to again make the claim which at the close of the trial below it practically abandoned—that a large proportion of these logs was cut from green timber—it will have that opportunity if the judgment which it has obtained on a different ground should be set aside. But the evidence relating to that subject is proper for discussion before a jury and can not be considered here.

V.

As to the exclusion by the trial court of the telegram of March 16 from the acting Commissioner of the General Land Office to the Logging Company, and the letter of March 18, 1893, from Warriner, as special agent of the General Land Office, to the Logging Company (101–123).

This correspondence was material and important for two reasons. In the first place, it showed that it was the understanding of the Government that the bonds were accepted in lieu of the logs, a point which the bonds (21–35) themselves would seem to have left in a state of uncertainty. And, in the second place, the telegram and the letter were important as showing that the acting Commissioner of the General Land Office had approved the bonds before they were accepted by the Government, thereby adding additional weight to the argument hereinbefore made as to the construction of the contracts with the Indians recognized by all parties by their conduct subsequent to the date of the contract. Since, as has been seen, the bonds showed on their face that the only controversy that had arisen between the Government and the contractors was whether a part of the logs had been cut from green timber, it was an important

fact that this admission was made not merely by the local agents in charge of the matter for the Government, but by the General Land Office itself. If that was the only controversy there could have been none as to the quantity of logs cut from dead and down timber.

VI.

As to the exclusion of the evidence of Charles A. Smith in relation to conversations with certain Indians in the fall of 1891.

This ruling forms the subject of the fifth assignment of error. Charles A. Smith in 1891 was a member of the firm of C. A. Smith and Company, which firm is a defendant in this suit, and was also the secretary and treasurer of the Logging Company. The contracts out of which this case grows were all made in the latter part of 1891. Smith testified that in fall of 1891 some of the Indians came to his office in Minneapolis. He names several of them, including some of the Indians with whom the contracts involved in this case were made, and expressly said that the contracts were signed after the conversation that he then had with these Indians; but he was not permitted to testify that the Indians then informed him "that there was a large amount of dead and down timber on the reservation which could be cut" (98, 99).

Since the measure of damages in the case largely depends upon the good faith of the defendants, any evidence which bears upon that question was competent. Of course, statements of the Indians were not admissible to show that in fact there was a large amount of dead and down timber on the reservation, but they would seem to be clearly proper for the purpose of showing that the defendants had information to that effect upon which they would naturally rely.

VII AND VIII.

The evidence which was admitted over the objection of the defendants and which forms the subject of the sixth and seventh assignments of error has no pertinency to the point upon which the court finally decided the case in favor of the United States, but it is submitted that the evidence was plainly irrelevant and should have been excluded. If there should be a new trial it is proper that the opinion of this court on the subject should be made known for the guidance of the circuit court at the next trial.

IX.

The eighth assignment of error relates to the exclusion by the court of testimony offered by the defendants as to the trade meaning of the term "dead timber." This evidence, too, is irrelevant upon the point upon which the case finally went off, but it may become very important if there should be another trial. It is submitted that under the repeated decisions of this court the evidence was admissible. Robertson *vs.* Salomon, 130 U. S., 412, holding oral evidence competent to show that in common parlance beans are vegetables and not seeds; Thornton *vs.* Smith, 8 Wall., 1, and Rives *vs.* Duke, 105 U. S., 132, holding such evidence admissible to prove that "dollars" meant Confederate money; and Robinson *vs.* U. S., 13 Wall., 363, holding such evidence admissible to show that a contract to deliver a quantity of barley meant to deliver it, not in bulk, but in sacks.

X.

AS TO THE JUDGMENT FOR COSTS.

The total costs taxed and allowed against the defendants in this case amounted to $5,320.66 (67–71). On this question we submit the case upon the following extract from the brief filed in the circuit court of appeals on behalf of the plaintiffs in error.

The court erred in taxing any costs against the defendants.

In the courts of the United States costs are governed by the Federal statutes and not by State laws or the practice of State courts.

O'Neil *vs.* R'y Co., 31 Fed., 663.
U. S. *vs.* Treadwell, 15 Fed., 532.
Tesla Electric Co. *vs.* Scott, 101 Fed., 524.

There are various statutes regulating the taxation of costs, when the United States is a party, in particular classes of cases.

U. S. *vs.* Harmon, 147 U. S., 268, 282.
Carlisle *vs.* Cooper, 64 Fed., 472.
U. S. *vs.* Davis, 54 Fed., 147.
Marine *vs.* Lyon, 62 Fed., 153.

But, so far as we are aware, there is not and never has been a statutory provision specifically regulating the taxation of costs between the United States and an adverse litigant in a case similar to that at bar.

It is said that at common law the sovereign shall neither pay nor receive costs.

3 Black Comm., 400.
1 Chitty Cr. Law, 825.

Whatever might be our opinion of the justice of this rule, if we were to discuss the question as *res nova* under modern republican ideas of a sovereign, we must concede that the rule has at least one equitable feature in that if the sovereign does not pay costs when it loses it does not get them when it wins. The same equity has been preserved in rule 31 of the circuit courts of appeals to the effect that "no costs shall be allowed in this court for or against the United States."

A practice, however, seems to have grown up in the United States circuit courts of adopting only one-half of the common-law rule, with the result of taxing costs in favor of the United States in classes of cases where no costs are allowed in favor of the adverse party. We claim that this practice is inequitable and against common-law tradition; that it has never been approved by the United States Supreme Court; and, further, that it has never been sanctioned by any reported Federal or State decision, where the point has been directly raised, argued, and passed upon. The amount of costs claimed by the Government in this case is large—over $5,000—or more than twice the amount in controversy required to give the circuit court original jurisdiction of a lawsuit. Defendant's costs have been nearly as great, and they could not have collected them if it had been finally determined, as it has been once, that the Government had no cause of action. Under these circumstances—however general or uniform may have been the practice of inferior courts in taxing costs in favor of the United States, however much deference a subordinate tribunal might feel obliged to yield to this practice—before this court of appellate jurisdiction we claim the right to raise and discuss the question *de nova* and have a decision based on reason and justice.

As already said, the United States Supreme Court has

gone no farther than to hold that, in the absence of a permissive statute, no costs can be taxed against the sovereign.

U. S. *vs.* La Vengeance, 3 Dall., 301.
U. S. *vs.* Barker, 2 Wheat., 395.
U. S. *vs.* Hove, 3 Cr., 73.
U. S. *vs.* Ringgold, 8 Pet., 150.
U. S. *vs.* McLemore, 4 How., 286.
U. S. *vs.* Boyd, 5 How., 29.
The Antelope, 12 Wheat., 550.

The decisions of the State courts seem to be to the same effect.

People *vs.* Pierce, 6 Ill., 553.
People *vs.* Teazel, 84 Ill., 539.
Metcalf *vs.* Auditor General, 38 Mich., 94.
Aplin *vs.* Baker, 84 Mich., 113.
State *vs.* Harrington, 2 Tyler (Vt.), 44.
Swan *vs.* Colfax, 2 Tyler (Vt.), 258.
State *vs.* Kinne, 41 N. H., 238.
State *vs.* Stearns, 31 N. H., 106.
State *vs.* Webster, 8 Me., 105.
Com. *vs.* Todd, 9 Bush, 708.
Coolier *vs.* Powell, 23 Ala., 579.
Stephens *vs.* State, 47 Ala., 696.
State *vs.* Greenwell, 4 Gill & J., 407.
State *vs.* Taylor, 34 La. Ann., 978.
State *vs.* Waggner, 42 La. Ann., 54.
People *vs.* Cloud, 50 Ill., 439.

In none of these cases will there be found any consideration of the reason or extent of the rule, but simply a bald affirmation that the sovereign does not pay costs. Some of the decisions contain the statement that statutes as to costs do not apply to the State, unless it is expressly named. But

on this statement the query at once arises—if the statutes do not apply to the State paying costs, why do they apply as to its receiving costs? Even-handed justice, plain common sense would seem to say that what is justice in one case ought to be justice in the other; that if the State does not pay costs, it ought not to receive them.

So far as our researches have gone we have found no case in the State or Federal courts, where the question has been raised, which holds that in the absence of an express statute the sovereign, if successful, can recover costs in a case in which, if unsuccessful, it would not pay costs. The nearest to a judicial expression which we have found is the remark in U. S. *vs.* Davis, 54 Fed., 147, 153, that "it will not be questioned that general costs may now be awarded to the United States, when it is the prevailing party." But this remark was purely *obiter* in that case, since the only question was as to the United States paying costs, not as to its receiving them, and the authorities referred to decide only the first half of the question. We see not why the proposition stated by the court should not be questioned, if it is against equity and there be nothing to support it except a more or less general practice, which has apparently never been subjected to the test of judicial examination and approval.

It is a general principle "that when the State goes into a court of justice as a suitor to obtain a judicial remedy it is subject to the same rules and is to the same extent bound to respect the judgment as parties are in the case of litigation between private persons."

Buchanan *vs.* R'y Co., 71 Fed., 324, 331.

"It is true the State cannot be compelled to litigate controversies with individuals; but when it voluntarily comes into court, asking the determination of its rights in a mere business transaction with an individual, it would seem that

it should be judged by the same rules and principles as are applied in controversies between other parties."

State *vs.* Dennis, 39 Kan., 516.

"When it becomes a suitor, it waives for the time its dignity as a sovereign. It lays aside its strong arm, by which it can at once enforce its own claims, and submits itself to the arbitration of the court and its practice and its proceedings."

People *vs.* Brandreth, 36 N. Y., 196.

"When the United States voluntarily appear in a court of justice, they at the same time voluntarily submit to the law, and place themselves on an equality with other litigants."

U. S. *vs.* Ingate, 48 Fed., 251.

See also:

Brent *vs.* Bank, 10 Pet., 615.
U. S. *vs.* Floyd, 8 Wall., 77.
U. S. *vs.* Coal and C. Co., 18 Fed., 278.

If, then, it be true that the sovereign, as a suitor seeking to enforce a private right of property, comes into court on an equality with private individuals and submits itself to the practice and procedure of the tribunal, we fail to see any justification for the position that the sovereign will not pay costs, but can collect them. Where is the equality between the parties if the sovereign, as in the present case, might, when successful, collect over $5,000 in costs and not pay one cent when unsuccessful? If this is not a case of one law for the sovereign and another for the individual it would be difficult to imagine one.

Nor is it any answer to say that statutes as to costs do not apply to the State unless expressly named. We are willing to concede the correctness of the principle; but the principle is violated, not followed, when it is held, as by the court below, that a statute of costs applies in favor of the State, but not against it.

We claim that this court, in the absence of authority to the contrary, with its own rule of practice and the teachings of the common law, establish the reasonable and equitable rule that the State neither pays nor receives costs, unless pursuant to express statutory enactment. It also seems to us a reasonable inference, from the fact that Congress has passed numerous statutes regulating in various ways the payment of costs in different classes of suits to which the United States may be a party (see examples cited in 54 Fed., 147, and 62 Fed., 153), that it was the intention of Congress to leave the common-law rule to apply to the classes of cases for which no specific provision was made. The circuit court of appeals in the fourth circuit has said:

"As costs are not a matter of right and are not recoverable as an incident to the judgment, but depend on statutory provisions, if he (the party adverse to the United States) desires costs in case of success, he must show by the act under which he sues that the United States has consented to pay costs, if defeated."

Marine *vs.* Lyon, 62 Fed., 153.

Why, then, if costs are not an incident to the judgment, but depend on the statute, should not the United States, when seeking to recover costs of an adverse party, be required to show the statutory basis for its claim, especially if it be true, as a general principle, that statutes as to costs do not apply to the sovereign unless expressly named?

The court erred in taxing the item of $356.69 for reporter's fees for record second trial for appeal.

The item of costs here specially objected to was for the stenographer's transcript of evidence furnished to plaintiff below after the conclusion of the second trial and for the purpose of preparing its record for the last appeal to this court [the circuit court of appeals]. The only statute under which this item could be claimed to be taxed is section 983,

United States General Statutes. But this section does not cover the cost of the transcript of evidence which was not obtained for nor used on the trial of the cause in the circuit court, but only for the purpose of an appeal to this court, and, so far as we are aware, all the Federal authorities are against the allowance of this item.

Monahan *vs.* Godkin, 100 Fed., 196, and authorities cited.

It is respectfully submitted that for all the foregoing reasons the judgment of the circuit court of appeals should be reversed, and that court directed to reverse the judgment of the circuit court and remand the case to the circuit court for a new trial.

A. S. WORTHINGTON,
Attorney for Plaintiffs in Error.

APPENDIX.

APPENDIX A.

THAYER, *Circuit Judge:*

This suit was brought by the United States against the Pine River Logging & Improvement Company, a corporation, and Joel B. Bassett and William L. Bassett, copartners as J. B. Bassett & Co., who are the defendants in error, and against John S. Pillsbury and Charles A. Smith, copartners as C. A. Smith & Co., for the wrongful conversion of 22,005,921 feet of pine lumber, which was alleged in the complaint to have been taken from the Mississippi Indian reservation in the State of Minnesota. The complaint, which contained nine counts, charged, in substance, that nine different parties had wrongfully felled certain pine trees standing on said Indian reservation, and had cut the same into logs, and had removed the logs from the reservation; that the trespass in question was committed at the special instance and request of the defendants; that the logs, when thus cut, had been delivered to the defendants; that the defendants had thereupon caused the logs to be floated down the Mississippi river to the city of Minneapolis, and to be there manufactured into lumber; and that they had sold the lumber, and had appropriated the proceeds thereof to their own use.

The answers which were filed by the defendants to the aforesaid complaint alleged, in substance, the following facts: That the logs referred to were cut under and by virtue of contracts which had been entered into with certain Chippewa Indians for the cutting of dead and down timber found on said reservation; that said contracts had been executed in pursuance of the provisions of an act of Congress approved February 16, 1889, in relation to the cutting of dead and fallen timber on Indian lands (25 Stat., 673, c. 172); that payment for the logs so cut and removed had been made in full to the United States and to the proper Indian agent in accordance with the provisions of said contracts; that said

logs were so cut by said Indians, and delivered to and accepted by the defendants in good faith, in the honest belief that said logs had been lawfully cut under said contracts, from dead and down timber, and that the defendants were entitled to the same, and became the owners thereof upon delivery of the logs, and upon the making of the aforesaid payments; that after the said logs had been delivered to the defendants, and before they were floated down the river to Minneapolis, the United States, through its proper officer, had seized and taken possession of the logs, claiming that they were cut from green and growing timber, and not from dead or down timber; that thereafter, for the purpose of preserving said logs, and realizing the full value of the same for the party who should ultimately be determined to be owner thereof, a contract was entered into between the United States and the defendants, which was as follows:

* * * * * * *

The answers further showed that thereafter, on March 10, 1893, after the logs had been driven to the city of Minneapolis in compliance with the provisions of the aforesaid contract, two bonds were accepted by the United States, one of them being executed by the Pine River Logging & Improvement Company as principal, and the other by the members of the firm of J. B. Bassett & Co. as principals. The bond executed by the Pine River Logging & Improvement Company contained the following recitals and condition, and the bond executed by the firm of J. B. Bassett & Co. was of like tenor and effect.

* * * * * * *

Replying to the aforesaid answers, the United States admitted, in substance, that the defendants, The Pine River Logging & Improvement Company and J. B. Bassett & Co., had entered into contract with the various persons named in the answers for the cutting of logs from dead and down timber on said Mississippi Indian reservation, but it denied that the logs in controversy had been cut pursuant to said contracts or in accordance with the act of Congress of February 16, 1889, authorizing the cutting of dead and down timber on Indian reservations. It averred, on the contrary, that the logs on account of which it sued were cut from pine trees on said reservation which were alive and standing. The United States admitted that it had seized and taken possession of

the logs in controversy, subsequent to the delivery thereof to the defendants; that it had thereafter entered into a contract with the defendants, such as was described in the answer, for the driving of the logs down the river to the city of Minneapolis, and that it had thereafter, on March 10, 1893, accepted from the defendants the bonds which were set forth in full in the answers. After the case was at issue on the aforesaid pleadings, the defendants, The Pine River Logging & Improvement Company, and Joel B. Bassett and William L. Bassett, composing the firm of J. B. Bassett & Co., filed a motion for judgment against the Government on the pleadings, for the sole reason, as stated in the motion, that on the facts admitted by the pleadings "the plaintiff above named (the United States) is not entitled to maintain an action of trover or conversion against said two defendants, or either of them, for the matters and things set out in said cause of action." This motion was sustained by the circuit court, and a judgment was entered against the United States. To reverse said judgment the case was removed to this court by a writ of error.

The grounds upon which the defendants in error seek to sustain the summary judgment which was entered in their favor by the circuit court is that by accepting the two bonds of date of March 10, 1893, the United States, in effect, agreed to relinquish all of its right, title, and interest in the logs which had been cut on the Indian reservation and to look to the bonds for whatever indemnity it might be able to obtain for the wrong and injury complained of. It is urged, in substance, that by accepting the bonds the Government not only agreed that the logs might be sawed into lumber, but that it also impliedly agreed that the lumber might be sold by the defendants for their own benefit; that the Government cannot count on the sale of the lumber by the defendants after it was sawed as a wrongful act, nor maintain an action against the defendants, except for a trespass on lands belonging to the United States, and that in such action the damage recoverable is merely compensation for the injury done to the land, over and above the value of the timber which was cut and removed. We are not able to assent to that view of the case. By the terms of the bonds it is obvious that the Government cannot maintain a suit thereon against the defendants until it has first recovered a judgment against them in some other form of action. Therefore

the view contended for denies the right of the Government to recover any compensation for the large amount of standing timber alleged to have been cut on the reservation, and limits its recovery to compensation for such injury as may have been done to the land, over and above the value of the severed trees, while the defendants were engaged in removing the timber. The bonds contained no provision authorizing the defendants to sell the timber in controversy after it should be manufactured into lumber at Minneapolis, and in view of the recitals found therein, and the circumstances under which they were executed and accepted, it is clear, we think, that the Government neither intended to authorize a sale of the lumber nor to part with its title thereto, nor to relinquish any of its rights growing out of the original wrongful acts described in the complaint. After the logs were seized, the Government, by the agreement of May 27, 1892, consented that the logs might be driven "without charge or cost to the United States, and under the supervision of a special agent of the General Land Office, * * * to such boom in the Mississippi river, at or near the city of Minneapolis, as the Mississippi & Rum River Boom Company may designate," for the purpose of preserving the property for the benefit of the party who should be adjudged to be the rightful owner, provided, however, that nothing done in that behalf "should be held in any proceeding, legal or otherwise, * * * to impair any right, title, property, or interest that the said parties of the second part, or either of them, or the United States, may have in or to the said logs, or any of them." The object of the contract was declared to be "to recognize and continue possession in the United States, and to allow said logs to be driven without in any way affecting the question of right, title, property, or interest in the logs, and to leave such questions for future determination."

When the logs had reached Minneapolis, it was found necessary to manufacture the same into lumber, as the bond recites, "for the preservation of the property for the interest of all concerned, pending said investigation, and a suit to be instituted by the United States, if it shall elect to do so, to determine the questions at issue between the parties." We fail to discover in the provisions of these bonds anything tantamount to a consent on the part of the United States that the defendants might market the lumber, when

the logs should have been sawed, for their own account, or any implied agreement by the United States that it would relinquish its title thereto. By the acceptance of the bonds the Government contemplated no relinquishment of its property rights, and no alteration in the legal status of the parties. It did consent that the form of the property might be changed from logs to lumber for the purpose of preserving its value, but beyond this its consent did not extend. The manifest purpose of the parties in entering into the agreement of May 27, 1892, and in executing the bonds of May 10, 1893, was to put the property in such form and shape that its value might be preserved, pending the litigation which was in contemplation, without altering the legal rights of either party. After the logs were manufactured into lumber, the defendants held the lumber as agents or bailees of the United States, precisely as they had previously held the logs under the agreement of May 27, 1892, while they were being driven down the river to Minneapolis.

It results from these views that the sale of the lumber by the defendants and the appropriation of the proceeds to their own use was a wrongful act, on account of which the United States may maintain an action for conversion, provided it appears on the trial, as is alleged in the petition and in the reply, that the lumber was in fact made from growing trees which were felled on the Indian reservation in question, and were cut into logs and removed therefrom in violation of law. Moreover, the Government did not lose its right to maintain an action for conversion on account of the wrongful removal of the logs from the reservation, the same having been cut from growing trees, by reason of the fact that it subsequently seized the logs, assumed the possession thereof, and entered into the contract aforesaid for driving them down the river to the city of Minneapolis. The doctrine is well settled that the recovery of the possession of property, otherwise than by judicial process, which has been wrongfully converted, does not deprive the true owner of his right to maintain an action of trover. In such a case the recovery of the property from the wrong-doer cannot be pleaded in bar to the action, but merely in mitigation of damages. Cattle Co. *vs.* Hall, 33 Fed., 236; Bank *vs.* Leavitt, 17 Pick., 1; Curtis *vs.* Ward, 20 Conn., 204;

Ewing *vs.* Blount, 20 Ala., 694; Pierce *vs.* Benjamin, 14 Pick., 356, 361; Sparks *vs.* Purdy, 11 Mo., 219, 223.

The question does not arise upon the record whether, in the event of a recovery by the United States, the defendants will be entitled, by way of mitigation of damages, to an allowance for the services rendered by the defendants in driving the logs from the place of seizure to Minneapolis and sawing them into lumber, whereby the value of the property was enhanced. No such question was considered by the circuit court, and no opinion on that point will be expressed by this court on the present occasion. The trial court decided the case upon the theory that the facts admitted by the pleadings disabled the United States from maintaining the present action, and in so ruling we think that the trial court erred.

It is further contended in behalf of the defendants in error that, although the ground upon which the trial court based its judgment was erroneous, yet that the judgment in their favor ought not to be disturbed, because the record discloses a misjoinder of causes of action, in that the Pine River Logging & Improvement Company and J. B. Bassett & Co. should have been sued separately for acts of conversion by them separately committed. There are two answers to this contention. The complaint which was filed by the United States does not disclose a misjoinder of causes of action. The allegations of the complaint are sufficient to show that all of the defend ants were jointly concerned in the cutting and removaof the logs from the reservation, and the plaintiff may elect to rely for a recovery on the original act of conversion rather than upon a sale of the lumber after the logs were sawed, with the consent of the United States. A second reason why the judgment cannot be upheld on account of the alleged misjoinder of causes of action, even if that point was well taken, is that the judgment rendered by the circuit court is in such form that if sustained it would bar a subsequent suit against either of the defendants for the wrongful conversion of the property. The circuit court "ordered and adjudged * * * that the plaintiff * * * take nothing of the said defendants, The Pine River Logging & Improvement Company and Joel B. Bassett and William L. Bassett, * * * and that they, and each of them, do go hence without day." This is, without doubt, a final judgment on

the merits, whereas, if the defendants were entitled to no greater relief than an order quashing the summons or dismissing the complaint because separate causes of action against different defendants had been erroneously united in the same complaint, the judgment should have been so expressed. The trial court evidently intended to dispose of the case on its merits, and entered a judgment accordingly. No attention was paid to the plea in abatement, and no action by the trial court was predicated upon that plea. We think, therefore, that the judgment cannot be upheld on the ground last suggested. The judgment of the circuit court is accordingly reversed, and the case is remanded for a new trial.

U. S. *vs.* Pine River Logging & Improvement Co., 78 Fed. Rep., 320, 325.

APPENDIX B.

THAYER, Circuit Judge, after stating the case, as above, delivered the opinion of the court.

The answer which was filed by the Pine River Logging & Improvement Company (hereinafter termed "Logging Company") admitted, in substance, that under and by virtue of the three contracts between itself and Indians, which are referred to in the foregoing statement, it had received into its possession, and had converted into lumber, and ultimately sold, an amount of pine saw-logs cut upon Indian reservation, which had yielded in the aggregate 13,463,400 feet of lumber, board measure. The defendants, Joel B. Bassett and William L. Bassett, likewise admitted, in substance, that under the two contracts with Indians above referred to, which they had succeeded in obtaining, they had received and converted into lumber, and sold, an amount of pine saw-logs, cut upon Indian reservations, which had yielded in the aggregate 4,136,860 feet of lumber, board measure. In other words, it was disclosed by the pleadings that under the five contracts with Indians above described, which together authorized the cutting and removal of dead and down timber to the amount of 2,750,000 feet, "more or less," or "about," the defendants had actually received from Indians, with

whom they had severally entered into the contracts aforesaid, no less than 17,600,260 feet of lumber in the shape of pine saw-logs, the same being logs that had been cut on Indian reservations and removed therefrom. The evidence in behalf of the Government tended to show that a much greater amount of lumber, to wit, 22,000,000 feet, had been cut and removed under an authority claimed to have been conferred by the aforesaid contracts. In view of these facts, the Government, by its counsel, asked the following instruction, which was refused:

"The contracts under which it is claimed these logs were cut provided for the cutting of a total of 2,750,000 feet of logs from dead and fallen trees. The amounts named in the five contracts are qualified by the words 'about' and 'more or less.' I charge you that the amounts named in the contracts are a material part thereof, and the addition of the qualifying words 'about' and 'more or less' is only for the purpose of providing against accidental variations arising from slight and unimportant excesses or deficiencies. The timber cut in excess of the amount stipulated beyond such accidental variations was illegally cut and removed, whether cut from dead or living trees."

The first question, therefore, which deserves consideration is whether an error was committed in refusing the foregoing instruction.

When an agreement is entered into to sell and deliver a certain quantity of an article the amount specified is often regarded as material and determinative of the amount sold, notwithstanding the use of the qualifying words "about" or "more or less" in connection with the amount specified. In many cases the use of such qualifying words in connection with some specified quantity is merely intended to cover the case of a slight variation in quantity, which may be due either to accident or to an inherent difficulty in making a delivery of the precise quantity sold. Indeed, it seems to be well settled that when a specified quantity of an article or thing bought or sold is mentioned in a contract the amount named will always be regarded as material and determinative, notwithstanding the use of the qualifying phrase "more or less," except in those cases where it is apparent or fairly inferable from other parts of the agreement that a particular lot of goods was intended to be sold without reference to the precise quantity, or enough thereof to

satisfy a particular need or to answer a given purpose. In the latter class of cases the specification of a particular quantity with the qualifying phrase "more or less" amounts to no more than a rough estimate of the probable quantity, which, in the absence of fraud, is not regarded as binding on either party. Brawley *vs.* U. S., 96 U. S., 168; Norrington *vs.* Wright, 115 U. S., 188, 204; 6 Sup. Ct., 12.

The five contracts that are involved in the case at bar contain no provisions from which it can be reasonably inferred that the several quantities of lumber therein specified were not intended to be determinative of the amount to be cut and delivered, or which would justify the conclusion that the amount to be delivered was to be determined by other circumstances. Tested by the contracts themselves, the inference is plain that the stipulation as to quantity is as material and obligatory upon the parties as any other stipulations which the contracts contain, and that the qualifying words "about" and "more or less" were inserted to cover slight variations from the amounts specified in the several contracts, which could not well be avoided in making the deliveries. This conclusion is supported by other considerations. Until the passage of the act of February 16, 1889, quoted above, in relation to dead and down timber, no right had ever been conferred upon Indians residing on Indian reservations to cut and dispose of the timber standing or growing thereon. It was a well-established doctrine then, as it is now, that the fee to all lands embraced in Indian reservations is vested in the United States; that the Indians residing thereon have merely a right of occupancy; and that they are not entitled to cut and sell timber without express legislative sanction. U. S. *vs.* Cook, 19 Wall., 591; Beecher *vs.* Wetherby, 95 U. S., 517. The act in question, which authorized the cutting and removal of dead and down timber, under such regulations as might be prescribed by the President, was passed for the double purpose of preventing such timber from going to waste, and at the same time providing lucrative employment for such Indians residing on reservations as might desire to take advantage of its provisions. It must be presumed from the nature of the law, and the class of persons to whom it relates, and whom it was intended to benefit, that it was the intention of Congress that such profit as might be realized from the sale of dead and down timber should, as far as possible, be shared alike

by all reputable Indians residing on a reservation; that equal opportunities to cut and remove the dead and down timber found thereon should, at least, be afforded to all; and that, in administering the act, care should be taken by the executive department of the Government in granting licenses for the removal of timber, so that few favored individuals, backed by large means, might not be able to appropriate all the benefits of the act, to the exclusion of the many. It must also be presumed that the law has heretofore been administered by the executive department of the Government, or, at least, that the intention has been to administer it, in accordance with the legislative purpose last expressed. Inasmuch, then, as the approval by the President of the five contracts now in question in effect conferred on a few persons the right to appropriate all the dead and down timber that might be found on certain Indian reservations; if it be true, as is contended, that the stipulations as to quantity therein contained are immaterial and meaningless, and inasmuch as one of the main objects of the law would be defeated by granting to a few favored individuals a roving commission of that character, it is not reasonable to suppose that any such authority was intended to be conferred when such contracts were approved by the President. It is altogether probable that the provisions found in the several contracts, limiting the total quantity of timber to be cut to 2,750,000 feet, were regarded by the executive department of the Government as material and obligatory, and that the agreements were approved by the President upon that theory. Viewing the contracts, then, in the light of well-established rules applicable to their interpretation, and also in the light of the statute under which they were executed, it is clear, we think, that the quantity which could be lawfully cut and removed was definitely fixed by the contracts, and that there was no warrant in law for cutting an amount of timber which was to any considerable extent in excess of the prescribed quantity.

In opposition to the foregoing views, and as a reason why the defendants should not be held accountable for their logical consequences, it is urged, in substance, that the defendants have already paid the contract price for such timber as was taken in excess of the prescribed quantity; that the timber was also delivered to them by the agents of the United States, and that the position now assumed by the Govern-

ment is "one of rank injustice" to its citizens. Concerning these several statements, it is sufficient to observe that the timber which was cut and removed from the reservation in excess of the prescribed quantity belonged to the United States, and that it has never as yet been paid for the same. The contracts which were approved by the President amounted to no more than a license to receive and appropriate a certain quantity of timber, and to pay the agreed price for the cutting and removal thereof to certain Indians. The transaction on the part of the Government was, in substance, a gift of a certain amount of timber to certain Indians. All the timber which was appropriated in excess of the stipulated amount was wrongfully taken, and such payments therefor as may have been made by the defendants to third parties by whom the timber was wrongfully cut and removed cannot be permitted to prejudice the right of the United States to recover its value. Moreover, no agent or officer of the United States who was on the ground when the deliveries took place had a shadow of authority to sanction a delivery of timber to any considerable amount, in excess of the quantity specified in the several agreements, under color of which the timber had been cut and removed. These agreements were as obligatory upon all agents and officers of the Government who were concerned in the deliveries as they were upon the parties to the several agreements, and none of the agents or officers there present were vested with the power either to alter or modify their provisions with respect to the quantity of timber that might be delivered, or to estop the United States from asserting its rights by any act of omission or commission. Whiteside *vs.* U. S., 93 U. S., 247, 257; *In re* Floyd Acceptances, 7 Wall., 666; Bowe *vs.* U. S., 42 Fed., 761, 778.

Neither do we perceive that the plea of good faith, which is so earnestly urged in behalf of the defendants, can be of any avail, or is entitled to serious consideration. All of the defendants except John S. Pillsbury and C. A. Smith were parties to one or more contracts, under color of which the timber was received and appropriated. They do not occupy the position of innocent third parties who bought and paid for the logs after they had been removed from the reservation and had entered the market, but they received and paid for the same with full knowledge of every provision which

the contracts contained and with full knowledge that, under license permitting the removal of dead and down timber to the amount of 2,750,000 feet, they were certainly receiving more than six, and possibly as much as eight, times that amount. As they cannot be heard to plead ignorance of the law as excuse for their misconduct, the pretense that the action of the Government savors of injustice when it seeks to compel them to pay for property which they have wrongfully taken and appropriated is entitled to little weight. On this branch of the case, therefore, we are constrained to hold that the instruction heretofore quoted contained a correct declaration of the law applicable to the case, and that it should have been given.

Another controversy of much importance arose on the trial below and has been renewed here concerning the meaning of the phrase "dead timber." Counsel for the Government appears to have taken the extreme view that a dead tree, within the meaning of the statute, was one which was utterly destitute of vitality, at least in its trunk and branches. On the other hand, the defendants contended, and their view was substantially adopted by the learned judge of the trial court, that trees should be esteemed dead if they were injured by fire or other cause so "that they will die within a reasonable period, although at the time they are living and have green tops and other signs of life." A further contention of the defendants, which was also sustained by the trial judge, was to the effect that even living trees which were unaffected by fire or other casualty might be properly classed as dead trees provided they were found standing in a clump of trees a large number of which were so badly injured by fire that they would die within a short time. This latter contention of the defendants was based upon testimony, which was offered by the defendants and objected to by the Government, to the effect that lumbermen generally regarded and classified uninjured living trees thus situated and in the midst of dead trees as themselves dead, or as included by the phrase "dead timber."

We are of opinion that the position assumed by the Government was not tenable. If the phrase "dead timber" should be held to include only such trees as are utterly destitute of vitality in their trunks and branches, it would probably happen that much valuable timber would be lost, and that one object of the statute which is now under con-

sideration would be frustrated by waiting for such a state of decay to be reached. In the course of a single season a tree might become to a large extent valueless for the purpose of making lumber, although at the commencement thereof it manifested considerable signs of life, and, if it had been then or previously cut, would have yielded a good quantity of lumber. In this respect the law should be given a reasonable interpretation, having in view the purpose of the lawmaker.

While, for the reasons last indicated, we are not able to adopt the extreme view advocated in behalf of the Government, we are equally unable to assent to the proposition that, under the provisions of the act here in question, living and uninjured forest trees may be classed as "dead timber," provided they stand among other trees, many of which are so badly hurt that they will die in a short time. It is hardly necessary to observe that, if the phrase "dead timber" was thus interpreted, it would afford a convenient excuse for stripping Indian reservations of a large amount of the living timber at present standing or growing thereon, since, in view of the frequency of forest fires at certain seasons of the year, it is probably true that many of the large bodies of timber found on Indian reservations are interspersed more or less thickly with trees which have been injured so badly by fire that they will shortly die. Under the instructions which were given by the trial court such bodies of timber could be entirely removed under licenses granted to cut "dead and down timber" on a simple showing of the licensees that a large number of the trees found on such tracts had been so badly injured by fire that they would most likely die. It is hardly probable, we think, that Congress foresaw and intended an interpretation of the phrase "dead timber" which would lead to such a result. The phrase was doubtless used by the law-maker in its ordinary sense to describe timber which was practically lifeless or mortally hurt and in such a state of decay that a prudent land-owner would ordinarily direct it to be forthwith cut to prevent a further deterioration in value.

The testimony on which the defendants found their claim that the phrase "dead timber," as used in the statute, comprehends living and uninjured trees in a certain situation is clearly inadequate, we think, to support a finding by the jury that the phrase "dead timber" had acquired the

meaning imputed to it by the defendants, and that it was used in that sense by Congress by reason of a well-known custom or usage prevalent throughout the United States or prevalent throughout a large portion of the United States. No attempt was made at the trial to show the territorial extent of the alleged practice of classifying living trees as dead trees, nor to prove that such practice was uniform among all classes of people, even in the locality where the practice was said to prevail. The testimony on this head was, in substance, that lumbermen in a given locality were in the habit of speaking of a clump of trees the greater portion of which had been killed or badly injured by fire as "dead timber." One witness testified in substance—and his testimony may be taken as a fair example of the residue of the evidence on this point—that if called upon to examine a 40-acre tract of timber he would report the tract as dead timber, although he would by no means term the living trees dead trees if he found that the greater portion of the trees had been destroyed by fire. Assuming the several statements of the witnesses to be true, they were not sufficient, in our judgment, to control the interpretation of a public statute to the extent of giving to certain words therein found a meaning which was clearly opposed to their ordinary signification. The proper office of a custom or usage is to explain the meaning of a private contract which is so vague or uncertain that the intent of the parties thereto cannot be determined without the aid of such extrinsic evidence. Barnard *vs.* Kellogg, 10 Wall., 383; Robinson *vs.* U. S., 13 Wall., 363. And while it may be that proof of a custom or usage is sometimes admissible to aid in the construction of a statute as well as a private contract, yet when it is offered for that purpose, and with a view of altering the ordinary meaning of ordinary words or phrases, the evidence concerning the usage ought to show that it was prevalent in all sections where the law was to become operative, and was so far universal in the sections where it prevailed as to leave no room for doubt that the usage was known to the law-maker, and that the statute which it serves to modify was enacted with reference thereto. Giving to the evidence which was adduced in the case at bar its full weight, it was insufficient to establish a usage of that character. We are of opinion, therefore, that the trial

court erred in permitting the jury to find that a custom or usage existed which would serve to change the ordinary meaning of the phrase "dead timber" so as to make it include living and uninjured trees. These latter words, as heretofore intimated, when used with reference to standing timber, should be held to include only such trees as are in fact lifeless, and those which are in such a state of decay in consequence of fire or other casualty that a prudent landowner would cause them to be cut forthwith, to prevent a further deterioration in value.

A question also arose in the trial court concerning the extent to which the Government would be bound by the acts of its logging superintendent, one T. W. Tidd, who had been designated by the Department of the Interior to supervise the cutting and removal of timber under the five contracts now in question. Certain exceptions were taken to the charge of the trial judge on this point which bring the question before this court for consideration. The duties devolved upon the aforesaid officer by departmental rules and regulations were "to go into the woods with the loggers and superintend and direct their labors, to the end that no green or growing timber may be cut and that no live trees are damaged in any manner so as to cause them to die, that they may be marketed under the provisions of the act in question, and to inspect the scaling of the logs."

The instructions which were given on this head were to the following effect: First, that if, without conspiracy or procurement on the part of the defendants, certain timber was wrongfully cut by loggers with the approval and under the oversight of the logging superintendent, by reason of his mistaken view of the terms of the contracts or the character of the timber, such action on the part of the Government's representative would bar a recovery against the defendants for the timber so unlawfully cut; second, that if living timber was wrongfully cut by Indians under color of the contracts without the knowledge or approval of said superintendent, then the Government could recover the stumpage value of the living or green timber so cut, less 10 per cent., although such timber was not cut by reason of a conspiracy among the defendants to obtain the same or by their procurement.

After declaring the law in the manner last indicated, the

court made the following statement, hereafter referred to as the third instruction:

"The Government appointed its own agent for the purpose of supervising and overseeing the cutting of this timber, so that *if timber was cut by the loggers of the character which the Government agent directed the loggers to cut, or assented to their cutting under the contract, the Government would be foreclosed with respect to all such timber. The Government is bound by the action of its representatives just the same as any other person would be who appointed an agent to look after his own interests and matters.* But the loggers would not have the right to cut green timber of the character not described, and if they did that without the knowledge or consent of the Government representatives—did it wrongfully and without his knowledge or assent—they would get no title to the logs, and they could not deliver any title to the defendants, even though the defendants might be innocent of any participation in it."

The exceptions which were taken by the Government were addressed to the first of the foregoing instructions and to that portion of the third instruction which has been placed in italics. The first of these instructions might be upheld if the court intended to say and was understood as saying that the Government was not entitled to recover for timber cut and removed from the reservation in those instances where, as the result of honest mistakes of judgment on the part of the logging superintendent which were committed while he was giving due attention to the performance of his official duties, certain injured trees were classified as dead timber and removed which, in fact, ought not to have been so classified. If thus understood, the instruction was substantially correct. The determination of what timber was "dead timber," in the eye of the statute, as that phrase has heretofore been defined, involved the exercise of judgment and discretion on the part of the logging superintendent; and, as he had been appointed to decide such questions, his decisions thereon, if made in good faith, after the exercise of due diligence to advise himself concerning the character of the timber which was being cut and delivered, ought to be regarded as binding upon the Government. Elliott *vs.* Railway Co., 40 U. S. App., 61; 21 C. C. A., 3, and 74 Fed., 707; Lewis *vs.* Railway Co., 49 Fed.,

708; Wood *vs.* Railroad Co., 39 Fed., 52, and cases there cited.

The third instruction shows, however, that the learned trial judge intended to concede, and was doubtless understood as conceding, to the logging superintendent a greater authority to bind the Government than is last indicated. The instruction contained a statement, in substance, that the Government was bound by the actions of its logging superintendent to the same extent that a private individual would be bound by the actions of his agent, and that if timber was cut by direction of the logging superintendent, and with his assent, the Government was foreclosed as to such timber, provided the defendants had done nothing to influence his conduct. This left the jury at liberty to infer that the Government could not recover the value of any living or green timber that had been cut with the knowledge and without objection on the part of the logging superintendent, although it was manifest that he had been guilty of a gross and willful neglect of his official duties, and had no pretense of discharging them in accordance with law. In other words, it left the defendants at full liberty to profit by derelictions of duty on the part of a public officer, provided they had not caused or inspired such conduct on his part.

For the reasons already indicated, the exceptions to the instructions now under consideration were well taken. It is well-established law that the United States is not liable to individuals for, and is not affected by, the unauthorized acts of its officers, nor for their misfeasances or laches. Gibbons *vs.* U. S., 8 Wall., 269, 274; Minturn *vs.* U. S., 106 U. S., 437, 444; 1 Sup. Ct., 402; Hart *vs.* U. S., 95 U. S., 316; U. S. *vs.* Kirkpatrick, 9 Wheat., 720; Stansbury *vs.* U. S., 8 Wall., 33; Moffat *vs.* U. S., 112 U. S., 24; 5 Sup. Ct., 10. The defendants well knew that no executive officer of the United States, not even the President himself, could authorize the cutting and removal of living and uninjured timber standing on public lands, including Indian reservations, the fee to which is in the United States, because such acts had been prohibited by the public statute (Rev. St. U. S., § 5388) and were not authorized by the act of February 16, 1889 (25 Stat., c. 172) in relation to dead and down timber. They were also well aware that one of the duties imposed on the logging superintendent was to see that no green or growing timber was cut or injured, and that they could only seek shelter

behind the decisions of the superintendent in those cases where it was properly within his province to determine whether injured trees were so badly hurt and liable to deterioration in value that they ought to be classified as dead and immediately cut. The defendants, therefore, should have been held liable for the value of all living and uninjured trees which were cut and removed and ultimately came into their possession, irrespective of the action of the logging superintendent, for the reason that he had no power to vest them with a title to such timber.

In line with the view which appears to have been entertained by the trial court concerning the authority of the logging superintendent to bind the United States, the jury were further instructed, in substance, that where green trees had been cut by loggers without the knowledge of the superintendent, he could, after discovering that they had been wrongfully cut, bind the Government by consenting that such timber might go in under the contract, because when living trees were once cut they were then "dead and down timber." We think that this instruction was erroneous, for the reason that the superintendent had no power to legalize a trespass, and estop the Government from recovering the value of such timber.

The remaining questions which the record presents are of less moment, and will be noticed on this occasion simply for the reason that they may arise on a second trial. It seems that some evidence was offered during the progress of the trial which tended to show that three Indians had cut a certain amount of timber on the reservation without having any contracts of their own which permitted them to do so; that such cutting had been done, however, under color of authority conferred by two of the contracts heretofore mentioned; that, with the assent of the owners of those contracts, the logs had been delivered to the defendants as if cut by the contractors themselves, to discharge their own obligations under said contracts; and that the owners of the contracts had received payment for the logs, as if cut by themselves, with the knowledge and implied assent of the logging superintendent. With reference to this subject, the court charged the jury, in substance, that, while the contracts in suit were not assignable, yet that the owners of the contracts would have the right to employ other persons to cut for them under the contracts,

and that whatever agreement they might make between themselves and their employés to that end would be a matter of no concern to any one except themselves. We perceive no error in giving this instruction. The owners of the several contracts did have the right to employ other persons to cut for them the amount and kind of timber specified therein. The employment of persons for that purpose was not tantamount to an assignment of the contracts, and was not unlawful.

On the trial below the Government asserted a right to recover as damages for the wrongful cutting of its timber not only the value of the timber, but the expenses which it had incurred in identifying and recovering the same. This contention was overruled, and an exception was saved. The proof shows that the logs in controversy were first seized by the United States on the bank of a stream in northern Minnesota, where they were deliverable, and that under certain agreements between the United States and the defendants, which were fully explained in U. S. *vs.* Pine River Logging and Improvement Co., 49 U. S. App., 24, 24 C. C. A., 101, and 78 Fed., 319, when the case was formerly before this court, the United States, without waiving any of its rights, released the logs that had been seized and permitted the defendants to raft them to the city of Minneapolis, where they were sawed into lumber. The lumber was eventually sold by the defendants, as the Government claimed, without its consent and wrongfully. The expenses which the Government sought to prove on the trial were such as it had incurred, after the wrongful seizure and release of the logs, in hunting up evidence to establish its case.

The rule permitting a plaintiff in an action of trover to have an allowance for expenses by him incurred in recovering property that has been wrongfully taken seems to have been applied heretofore only in those cases where the property is actually recovered by the plaintiff, and such recovery is pleaded by way of mitigation of damages. When the damages are thus mitigated the plaintiff is permitted to recoup his necessary expenses in recovering the property; but where there has been no eventual recovery of the property by the plaintiff, and he is compelled to take its value, as in the case at bar, the better view seems to be that the recovery is limited to the market value

of the property at the time and place of conversion and interest. Ewing *vs.* Blount, 20 Ala., 694; Collins *vs.* Lowry, 78 Wis., 329; 47 N. W., 612; Cattle Co. *vs.* Hall, 33 Fed., 236, and cases there cited; 3 Suth. Dam. (2d ed.), § 1141. No error was committed, therefore, by the trial court in excluding the evidence as to expenses that had been incurred by the United States which it sought to introduce.

Under regulations which have been established by the President of the United States for cutting dead and down timber on Indian reservations, pursuant to the act of February 16, 1889, Indians who obtain licenses to cut such timber are required to pay 10 per cent. of the gross proceeds of all dead and down timber cut and sold, to the poor fund of the tribe, to aid in the support of old, sick, and helpless members of the tribe. The contracts involved in the case in hand recognized the existence of this regulation, and in accordance therewith provided for the payment of 10 per cent. of the purchase price of all timber cut and removed to the United States Indian department. Ten per cent. of the purchase price for all timber received under color of the contracts was accordingly paid by the defendants to the proper Indian agent, and the trial court charged that the defendants were entitled to a credit therefor in assessing the damages for green and living timber which was found to have been wrongfully cut and moved. We feel constrained to hold that this instruction was erroneous. If the defendants received and disposed of living and uninjured timber which was wrongfully cut they are liable to the Government for its full value. We are unable to perceive any legal ground upon which payments that they may have made into the Indian poor fund for the support of indigent Indians can be accepted or regarded as payments made to the United States for its benefit. Such payments stand on the same footing as a payment made to a third party, inasmuch as the Government received the money simply as a trustee for the benefit of poor Indians and has doubtless expended it for their benefit.

Another question was raised at the trial, and an exception was duly saved, which will be noticed briefly, because it has been discussed in the briefs, although it is not distinctly raised by the assignment of errors. The question is whether the trial court, at the conclusion of the Government's testimony, properly required it to elect whether it would

take the value of the logs in controversy at the place where they were originally seized—that is, in northern Minnesota—or, in lieu thereof, would take the value of the lumber which was made therefrom at the city of Minneapolis, at which place, as it was claimed, the lumber was wrongfully sold. The trial court ruled, in substance, that after the Government had closed its case, it was no more than reasonable to require it to state at what place and time it would elect to have its damages assessed, because it could not recover the value of the logs and also the value of the lumber made therefrom, and because it would be unnecessary to enter upon a long inquiry as to the cost of rafting the logs to Minneapolis and sawing them, provided it determined to take the value of the logs in northern Minnesota and to have its damages assessed at that time and place. We fully concur in the views of the trial judge on this point, and are unable to see that the ruling in question placed the Government at any disadvantage or prejudiced its rights to any material extent.

The Government further insists that the trial court erroneously refused to permit one of its witnesses to detail a conversation which he had with a person by the name of Galbreath, who was a foreman of one of the logging camps where a portion of the logs in controversy were cut, which conversation occurred at the camp during the winter of 1891 and 1892, and related to the character of the timber, whether living or dead, which was being cut. It also complains because one of its witnesses was not allowed to answer the question whether he regarded the trees which had been burned from six inches to six feet from the butt upwards as dead timber; also because another witness was not allowed to describe the effect which a fire running through his land had had upon the timber growing thereon. We think it is manifest that the last two complaints are not well founded, because the proposed testimony was irrelevant and immaterial. Concerning the statements made by the foreman, Galbreath, there is more room for controversy; but, upon the whole, we have concluded that it was not shown that the statements in question were so coincident with an act which was being done at the time by Galbreath as to constitute them a part of the *res gestæ*, and it is clear that they were not admissible on any other ground. It is most probable, we think, that the statements related to what had been

done previously, and would have proven to be merely narrative of a past transaction, and inadmissible for that reason.

It results from what has been said that the judgment must be reversed, and the cause remanded for a new trial. It is so ordered.

United States *vs.* Pine River Logging and Improvement Company, 89 Fed. Rep., 910, 921.

No. 250.

Brf. of Atty. of Plaintiffs in Error, Supreme Court, Kansas City, Mo.

v. Richards } O. C.

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In the Supreme Court of the United States.

OCTOBER TERM, 1901.

THE PINE RIVER LOGGING AND IMPROVEMENT COMPANY et al., plaintiffs in error,
v.
THE UNITED STATES. } No. 250.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR DEFENDANT IN ERROR.

In the Supreme Court of the United States.

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THE PINE RIVER LOGGING AND IMPROVEMENT COMPANY et al., plaintiffs in error,
v.
THE UNITED STATES.
No. 250.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR DEFENDANT IN ERROR.

I.

THERE WAS NO AUTHORITY GRANTED TO ANY INDIAN OR INDIANS TO CUT, REMOVE, SELL, AND DELIVER TIMBER FROM THE RESERVATIONS MENTIONED IN THIS SUIT, EXCEPT AS SPECIFIED IN THE CONTRACTS SET FORTH IN THE PLEADINGS.

The fee to these lands remained in the United States. Unlawfully cutting timber upon any Indian reservation, or lands belonging to or occupied by any tribe of Indians under authority of the United States, is punishable with severe penalties. (Sec. 5388, R. S., as amended June 4, 1888, Sup. vol. 1, chap. 340, p. 588.) The Indians having only a right of occupancy in the

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lands, the presumption is against their authority to cut and sell the timber. (*United States* v. *Cook*, 17 Wall., 591, 594.)

The President is clothed with discretionary power, from year to year, to authorize Indians residing on a reservation to cut and sell timber for the sole benefit of such Indian or Indians. The language excludes the idea of an authority, in general terms, to all Indians on the reservation. It contemplates special authority to individuals. It may be granted at certain times, being exercised "from year to year." It is for the sole benefit of individual Indian or Indians, to be named, or designated, or recognized.

The authority is given, subject to such regulations as the President may prescribe. Regulations were framed by the Secretary of the Interior, approved by the President, and extended November 22, 1890, to the Indians of the Chippewa reservations in the State of Minnesota. These regulations provided that each Indian should provide his own logging outfit and supplies; that every Indian (except those whose children do not attend school, unless some good reason exists) on the reservation not well employed should be permitted and encouraged to engage in the work; that all cutting should be done under supervision from the agency; that except the superintendent and, if necessary, a foreman and blacksmith, all white laborers should be excluded from the reservation; that no sale should be valid until approved by the Commissioner of Indian Affairs; that after certain deductions the net

proceeds should be divided and paid by the agent to the individual or companies of the tribe in exact proportion to the scale of logs banked by each.

All work "in and about preparing the timber for market, every provision for the sale of and payment for the same, and distribution of the proceeds" were to be under the superintendence and control of the Commissioner of Indian Affairs and the Indian agent.

During the year 1891–92 five contracts were made between individual Indians and the defendants. All the timber cut and sold from these reservations is claimed to have been cut and sold under these contracts.

It seems to have been directed by the superintendent appointed to oversee the cutting that the Indians must cut under some one of these contracts. (Tr., pp. 85, 90, 91.)

These contracts were approved by the Commissioner of Indian Affairs and the President. They differed, in some of their terms, from the regulations published, as above stated. But, being approved, they became regulations within the statute for the acts done in pursuance of them. There was no other authority given to these Indians to cut and dispose of timber. There was none other properly recognized. All the terms of the permission must be strictly observed. To authorize these few Indians to have a monopoly of the cutting and disposition of all the dead and down timber on the reservation would be entirely violative of the intent of the President, as shown in the correspondence had between him and

the Secretary of the Interior. Taking into consideration the statute, the exercise of discretion by the President, as shown in the correspondence and the regulations, the differing and limited terms of the contracts as to amounts of logs to be delivered under each, two things are perfectly clear: First, that the logs were to be cut from dead timber, standing or fallen; second, that the Indians named in the several contracts were authorized to cut and sell only the amount stated in their contract. In the letter of November 21, 1890 (Tr., p. 113), the Secretary states that the Department had declined to approve a contract between Charles Losh and Nellie Lydick, Indians of the Lake Winibigoshish Reservation, and the Pine River Logging and Improvement Company, for the cutting and disposing of about 4,000,000 feet of pine logs from the dead and down timber of Lake Winibigoshish Reservation, Minn. He then recommends approval of this contract. Whether it was approved or not the record does not disclose. But this action, taken in 1890, shows how these contracts were entered into in reference to amounts permitted to be cut and disposed of. And the same course was continued in 1891–92.

This cutting and sale were for the benefit of the working Indian. The operation had nothing to do with the land. It was not like the clearing of the land for its improvement. It was not like the cutting of trees for mining purposes. It was not like the cutting of timber by railroads for construction purposes.

It was well said by the judge delivering the opinion

in this case, *United States* v. *Pine River Logging and Improvement Company* (89 Fed. R., 907, 912):

> The act in question, which authorized the cutting and removal of dead and down timber, under such regulations as might be prescribed by the President, was passed for the double purpose of preventing such timber from going to waste, and at the same time providing lucrative employment for such Indians residing on reservations as might desire to take advantage of its provisions. It must be presumed from the nature of the law, and the class of persons to whom it relates and whom it was intended to benefit, that it was the intention of Congress that such profit as might be realized from the sale of dead and down timber should, as far as possible, be shared alike by all reputable Indians residing on a reservation; that equal opportunities to cut and remove the dead and down timber found thereon should, at least, be afforded to all; and that, in administering the act, care should be taken by the executive department of the Government in granting licenses for the removal of timber, so that a few favored individuals, backed by large means, might not be able to appropriate all the benefits of the act, to the exclusion of the many. It must also be presumed that the law has heretofore been administered by the executive department of the Government, or, at least, that the intention has been to administer it in accordance with the legislative purpose last expressed. Inasmuch, then, as the approval by the President of the five contracts now in question in effect conferred on a few persons the right to

> appropriate all the dead and down timber that might be found on certain Indian reservations; if it be true, as is contended, that the stipulations as to quantity therein contained are immaterial and meaningless; and inasmuch as one of the main objects of the law would be defeated by granting to a few favored individuals a roving commission of that character, it is not reasonable to suppose that any such authority was intended to be conferred when such contracts were approved by the President. It is altogether probable that the provisions found in the several contracts, limiting the total quantity of timber to be cut to 2,750,000 feet, were regarded by the Executive Department of the Government as material and obligatory, and that the agreements were approved by the President upon that theory. Viewing the contracts, then, in the light of well-established rules applicable to their interpretation, and also in the light of the statute under which they were executed, it is clear, we think, that the quantity which could be lawfully cut and removed was definitely fixed by the contracts, and that there was no warrant in law for cutting an amount of timber which was to any considerable extent in excess of the prescribed quantity.

And it is to be remembered that the declarations of law by the circuit court of appeals, in the opinion just referred to, controlled the circuit court at the trial of the case, in which the judgment was rendered, from the affirmance of which judgment this writ of error has been taken. The assignments of errors are directed principally to the propositions declared in that opinion.

A similar view was taken in the recent case of *Nor. Pac. Ry. Co.* v. *Lewis* (162 U. S., 366, 376), Justice Peckham delivering the opinion of the court and approving *United States* v. *Cook* (supra):

> The Indians having only the right of occupancy in the lands, and therefore presumptively no right to cut timber for the purpose of selling, it was further held that if they cut timber in the process of improving the land, that fact must be shown; the presumption was against the authority to cut and sell the timber. Every purchaser from them, it was held, was charged with notice of this presumption, and that to maintain his title it was incumbent on the purchaser to show that the timber was rightfully severed from the land. So here. As the Government was the sole and absolute owner of these lands, and of the timber growing thereon, the presumption would be against the right of any third person to cut the timber, and if he claimed the right by virtue of any authority or license given him by the owner—that is, the Government—he would be compelled to show it.
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> Again, the consent to cut timber granted by the act of 1878 being upon the conditions and for the purposes therein specified and to the classes of persons therein described, whether the plaintiffs, who did this cutting, had complied with those conditions and had cut timber for the purposes mentioned, and were within the class of persons described in the statute, were facts which rested peculiarly within their own knowledge, the burden of showing which

would naturally and rightfully be cast upon them. As the plaintiffs failed to show that they came within the conditions and exceptions specified in the act of 1878, the presumption that they cut the timber illegally became conclusive.

II.

THE DEFENDANTS WERE NOT AUTHORIZED TO RECEIVE FROM AND PAY FOR, TO THE INDIANS, ANY TIMBER IN EXCESS OF THE AMOUNTS NAMED IN THE CONTRACTS.

These contracts depended for their validity upon the approval of the President. Their terms could not be enlarged or diminished without the President's sanction. Their chief characteristics, necessarily, were the amounts of logs to be delivered, the price to be paid, and the character of the timber to be cut.

It was not within the power of the parties signing the contracts—the Indians and the lumber companies—to alter or modify the conditions and terms of the contracts in any particular. To prevent any such combination was the very object of the regulations prescribed by the President, and of the law requiring these regulations. It is claimed by the defendants that where both of the parties to a contract by their subsequent conduct have given it a construction different from that which the law might have given it the courts will adopt that construction. The question determined in all the cases cited in support of this contention was as to the intention of the parties where there was ambiguity or uncertainty in the language of the agreement. Such was *Chicago*

v. *Sheldon* (9 Wall., 54) and the other cases cited. In *District of Columbia* v. *Gallaher, Loane & Co.*, much relied upon by the defendants, this court referred to the findings of fact and opinion of the Court of Claims and adopted the reasoning of that court upon the facts. Now that case was one where the contract required work to be done according to sample and specifications, under the direction of the engineer of one of the parties, and the sample and specifications being irreconcilable, the engineer ordered a modification, to which the contractor assented and the work was regarded as performed and accepted at the contract price. It is said that stress was laid upon the fact that the work was done under the supervision of the District engineer. This was because the work was "subject to the approval of the engineer," in the contract. (*Gallaher, Loane & Co.* v. *District of Columbia*, 19 C. Cl. R., 564.)

There is no ambiguity nor indefiniteness in the five contracts under discussion. They are alike in their terms, except the significant differences in the amounts of logs to be cut and delivered under each. The execution of these contracts did not "necessarily involve a practical construction." On the contrary, the language used is plain, simple, ordinary language. The loggers could cut nothing but dead and down timber. The companies could purchase nothing but dead and down timber. The contracts were all made in conformity with the "regulations," either so stated in the contracts or embodied in the approval. The contracts were executed before any cutting was done. The

quantities of logs to be cut and delivered were differently but explicitly stated. This was absolutely required in order to meet the requirement in the statute that the privilege of cutting was for the sole benefit of the Indian or Indians doing the work; and the expressed determination in the regulations that every Indian on the reservation not well employed should be permitted and encouraged to engage in the work and no favoritism should be shown by the agent in his management of the business. "The quantity specified is material and governs the contract." The use of the words "more or less" in some of the contracts, and the word "about" in others, emphasizes the conclusion that the quantities are limited and expressed. To hold that they neutralize the specific words of amount would be to make the latter useless and meaningless.

The true rules of interpretation of contracts like these are clearly laid down in *Brawley* v. *United States* (96 U. S., 168, 171, 172).

> Where a contract is made to sell or furnish certain goods identified by reference to independent circumstances, such as an entire lot deposited in a certain warehouse, or all that may be manufactured by the vendor in a certain establishment, or that may be shipped by his agent or correspondent in certain vessels, and the quantity is named with the qualification of "about" or "more or less," or words of like import, the contract applies to the specific lot; and the naming of the quantity is not regarded as in the nature of a warranty, but only as an

estimate of the probable amount, in reference to which good faith is all that is required of the party making it.

* * * * *

But when no such independent circumstances are referred to, and the engagement is to furnish goods of a certain quality or character to a certain amount, the quantity specified is material, and governs the contract. The addition of the qualifying words "about," "more or less," and the like, in such cases, is only for the purpose of providing against accidental variations arising from slight and unimportant excesses or deficiencies in number, measure, or weight.

If, however, the qualifying words are supplemented by other stipulations or conditions which give them a broader scope or a more extensive significancy, then the contract is to be governed by such added stipulations or conditions. As, if it be agreed to furnish so many bushels of wheat, more or less, according to what the party receiving it shall require for the use of his mill, then the contract is not governed by the quantity named, nor by that quantity with slight and unimportant variations, but by what the receiving party shall require for the use of his mill; and the variation from the quantity named will depend upon his discretion and requirements, so long as he acts in good faith.

* * * * *

The written contract merged all previous negotiations, and is presumed in law to express the final understanding of the parties. If the

> contract did not express the true agreement, it was the claimant's folly to have signed it. The court can not be governed by any such outside considerations. Previous and contemporary transactions and facts may be very properly taken into consideration to ascertain the subject-matter of a contract and the sense in which the parties may have used particular terms, but not to alter or modify the plain language which they have used.

See also *Norrington* v. *Wright* (115 U. S., 188).

In *Cabot* v. *Winsor* (1 Allen (Mass.) 550) the court held:

> Nor are the terms of the contract rendered uncertain or doubtful by reference to extrinsic facts, so as to create a latent ambiguity. The words "more or less," which seem to have given rise to the contention between the parties, have a plain, ordinary, and popular signification, and are often used in contracts relating both to real and personal estate. As applied to quantity, they are to be construed as qualifying a representation or statement of an absolute and definite amount, so that neither party to a contract can avoid it or set it aside by reason of any deficiency or surplus, occasioned by no fraud or want of good faith, if there is a reasonable approximation to the quantity specifically named as the subject of the contract. In sales of merchandise, especially in large quantities, where it is impossible to ascertain with precise accuracy the number or weight of the articles before concluding the contract for their purchase, it is necessary and usual to insert the

words "more or less" or "about" in connection with the specific amount, which forms the subject of the contract, in order to cover any variation from the estimate, which is likely to arise from differences in weight, errors in counting, diminution by shrinking, or other similar causes. But in such cases parol evidence is not admitted to show that the parties intended to buy and sell a different quantity or amount from that stated in the written agreement. On the contrary, it is held to be a contract for the sale of the quantity or amount specified; and the effect of the words "more or less" is only to permit the vendor to fulfill his contract by a delivery of so much as may reasonably and fairly be held to be a compliance with the contract, after making due allowance for an excess or short delivery arising from the usual and ordinary causes, which prevent an accurate estimate of the weight or number of the articles sold; or, as it is sometimes briefly expressed, it is "an absolute contract for a specific quantity within a reasonable limit." What is a reasonable limit and a substantial compliance with such contract, if the facts are not in dispute between the parties, is a question for the determination of the court. (*Cross* v. *Eglin*, 2 B. & Ad., 106); *Moore* v. *Campbell*, 10 Exch., 323; *Bourne* v. *Seymour*, 16 C. B., 336; *Stebbins* v. *Eddy*, 4 Mason, 414, 419; *Pembroke Iron Co.* v. *Parsons*, 5 Gray, 591.)

It was not therefore necessary for the loggers in this case to scale their cuttings each night in order to find whether they had reached the exact limits named in

the contracts, and had there been a slight excess or deficiency the words "about" and "more or less" in the permits would have been sufficient to protect them against the effect of the same; but it is preposterous to claim that a cutting more than six times as great as that permitted, and under the William Fairbanks contract, as construed by the plaintiffs in error, over sixteen times as great, is slight or unimportant. Nor is there any pretense that this variation was accidental, for all through the cutting the defendants below were careful to furnish money and supplies only to an extent justified by the logs then actually cut; and their claim is not that there was an accidental variation, but that, although such variation was intentional, it was justified by the contracts. This being so, and it being established that there was no accidental variation such as the words "about" and "more or less" were inserted to provide against, there is no issue of fact as to the amount of timber cut, because the conditions suggested by the quoted words did not arise and do not exist in the case at bar.

The qualifying words "about" and "more or less" were, then, inserted in these contracts to cover an accidental or unavoidable variation in amount. No such variation occurred. The circumstances provided for being nonexistent, the words are inoperative.

Again it appears that in their argument upon this subject the plaintiffs in error have assumed that the United States asks for a construction of the contracts on the theory that it is seeking to recover damages for

a breach of the same. As a matter of fact the contracts are not the subject of the action, which is one in trover; and as it must now be conceded that the terms of the contracts were violated by the loggers, both as to the amount and character of the timber cut, the position of the United States in suing upon the tort is clearly justified. This being so, under a strict construction, it is believed that the trial judge might properly have held that the plaintiffs in error were not entitled to any part of the logs named in the contracts which they had violated, and, therefore, instead of being injured by the ruling of the trial court, they are called upon to pay for 2,750,000 feet less than they actually converted.

> When a condition on which a donation was made has not been complied with, the donation may be revoked, whether the property donated be in the possession of the donee or of a transferee of the donee. (*Eskrige* v. *Farrar*, 30 La. Ann., 718; *Roundtree* v. *Smith*, 152 Ill., 493.)
>
> A donee must take the gift with its conditions or not at all. (*Berry* v. *Berry*, 31 Iowa, 415.)

Whatever alternative propositions plaintiffs in error may present, the justification for their acts must rest upon rights obtained by their contracts. If they break loose from this mooring they are hopelessly adrift. They must rely upon the statute and the regulations. If they repudiate or ignore the contracts, they have neither. If they claim that the Indians could cut and sell any and all dead and down timber on the reservation, and that they purchased upon that belief, they

are met with the stubborn regulation that the logs should be sold at public sale to the highest bidder, either by auction or by calling for sealed proposals, at the discretion of the Secretary, for cash.

Nor, ignoring or attempting to explain away the provisions of the contracts, do they obtain any assistance by the fact, if sustained, that the work was done under the superintendence of a Government superintendent, and that at a final settlement the Indian agent, with full knowledge of the amount cut and delivered, received a balance due, and gave title to the logs. These acts were not within the province of such officers. The superintendent's duty was to go into the woods with the loggers and superintend and direct their labors, to the end that no green or growing timber might be cut, and no live trees damaged so as to cause them to die, and to inspect the scaling of the logs. The agent had nothing to do but to appoint the superintendent and to divide and pay the proportionate amounts due to the Indians. All the terms and stipulations of the contracts were settled by the President. A delegated power can not be delegated. No discretion to waive or alter any part of these agreements was given to these subordinate officers. In truth, one of the many irregular and unwarranted things, connected with all these transactions, is the utter disregard by these agents of the regulations established under the statute, as to the character of the timber cut, the furnishing of supplies, the employment of white labor, and the distribution of the work among all qualified Indians.

The fact that the dead-and-down timber would become valueless and rot if not quickly utilized, can not be used as an argument to show the intention to authorize the cutting and sale of all such timber on the reservation. If the authority had been given to that extent, as is rather indefinitely claimed, it necessarily follows that all the Indians able to work would have been afforded the facility and encouraged to do so. Not only was this not done, but all persons except the loggers named in the contracts were excluded and forbidden. It was never recognized by anyone that the utilization of this timber was an element contemplated, except as it afforded work for the Indians and the means of procuring food and clothing, for the want of which they were suffering. This gift, as it is well styled in the opinion of the learned judge in this case in 89 Fed. Rep., was determinate in respect to character, amount, and persons.

If timber, other than dead and fallen, or of an amount in excess of that named in the contract, was cut and removed with the agent's knowledge and consent, he acted without authority, whether through mistake, inadvertence, or fraudulent intent, and the Government is not bound.

As has been seen, the only duty of the logging superintendent was to go into the woods with the loggers to prevent the cutting of green or growing timber and the injury and death of living trees. No special agent can bind his principal beyond the limits of his express authority. (*Butler* v. *Maples*, 9 Wallace, 766.)

> The Government is not bound by the acts or declaration of its agent *unless it manifestly appears* that he acted within the scope of his authority, or was employed in his capacity as a public agent to do the act or make the declaration for it. (*Whiteside* v. *United States*, 93 U. S., 247.)

Any party dealing with such agent must, at his peril, ascertain the limits of the agent's authority. (Floyd Acceptances, 7 Wall., 666; *Schimmelpennick* v. *Bayard*, 1 Pet., 264; *Whiteside* v. *United States*, supra.)

Even if the last proposition were not correct, the principal is bound, if at all, as to acts not within the express authority by estoppel, and this is not a case where the Government may be estopped.

> No government has ever held itself liable to individuals for the misfeasance, laches, or unauthorized exercise of power of its officers and agents. (*Gibbons* v. *United States*, 8 Wall., 269; *Minturn* v. *United States*, 106 U. S., 444; *Hart* v. *United States*, 95 U. S., 316; *Moffat* v. *United States*, 112 U. S., 24.)

As was said by Mr. Justice Bradley in *Chisholm* v. *The City of Montgomery* (2 Wood, 594):

> Public officers can not acquire authority by declaring that they have it. They can not thus shut the mouth of the public whom they represent. The officers and agents of private corporations intrusted by them with the management of their own business and property may estop their principals and subject them to the consequences of their unauthorized acts, but the body politic can not be thus silenced

by the acts or declarations of its agents. If it could be, unlimited scope would be given to the peculations and frauds of public officers. I hold it to be a sound proposition that no municipal or political body can be estopped by the acts or declarations of its officers from denying their authority to bind it.

The above propositions apply with equal force to the acts of both the Indian agent and the logging superintendent.

III.

THIS HAVING BEEN A WILLFUL TRESPASS, THE DOCTRINE AS TO THE MEASURE OF DAMAGES WAS CORRECTLY LAID DOWN BY THE CIRCUIT JUDGE, AND FOLLOWS THE RULE IN WOODENWARE COMPANY v. UNITED STATES (106 U. S., 432).

Where the plaintiff, in an action for timber cut and carried away from his land, recovers damages, the rule for assessing them against the defendant is:

1. Where he is a willful trespasser, the full value of the property at the time and place of demand or of suit brought, with no deduction for his labor and expense. 2. Where he is an unintentional or mistaken trespasser, or an innocent vendee from such trespasser, the value at the time of conversion, less the amount which he and his vendor have added to its value. 3. Where he is a purchaser without wrong from a willful trespasser, the value at the time of such purchase.

Justice Miller, in delivering the opinion of the court (p. 435), says:

But the case before us is one where, by reason of the willful wrong of the party who

committed the trespass, he was liable, under the rule we have supposed to be established, for the value of the timber at Depere the moment before he sold it, and the question to be decided is whether the defendant, who purchased it then, with no notice that the property belonged to the United States, and with no intention to do wrong, must respond by the same rule of damages as his vendor should if he had been sued.

It seems to us that he must. The timber at all stages of the conversion was the property of plaintiff. Its purchase by defendant did not divest the title nor the right of possession. The recovery of any sum whatever is based upon that proposition. This right, at the moment preceding the purchase by defendant at Depere, was perfect, with no right in anyone to set up a claim for work and labor bestowed on it by the wrongdoer. It is also plain that by purchase from the wrongdoer defendant did not acquire any better title to the property than his vendor had. It is not a case where an innocent purchaser can defend himself under that plea. If it were, he would be liable to no damages at all, and no recovery could be had. On the contrary, it is a case to which the doctrine of *caveat emptor* applies, and hence the right of recovery in plaintiff.

On what ground, then, can it be maintained that the right to recover against him should not be just what it was against the vendor the moment before he interfered and acquired possession? If the case were one which concerned additional value placed upon the prop-

> erty by the work or labor of the defendant after he had purchased, the same rule might be applied as in case of the inadvertent trespasser.

This rule has been applied in numerous cases in the courts of original jurisdiction. (*United States* v. *Williams*, 18 Fed. Rep., 473; *United States* v. *Heilner*, 26 Fed. Rep., 80; *Cheney* v. *Stone Co.*, 41 Fed. Rep., 740; *United States* v. *Wingate*, 44 Fed. Rep., 129; *Kingory* v. *United States*, 44 Fed. Rep., 669; *United States* v. *Perkins*, 44 Fed. Rep., 670; *United States* v. *Baxter*, 46 Fed. Rep., 350.) As was said by Justice Brown, in *Shiver* v. *United States* (159 U. S., 491, 499), in speaking of a similar rule: "This general consensus of opinion is entitled to great weight as authority."

An ingenious attempt is made in the brief of counsel for plaintiff in error to distinguish the facts in the case at bar from the facts in the *Wooden Ware* case. The only foundation for this contention is that the parties acted under a mistake, that mistake being that the Indians and the contractors supposed that there was a right to cut all the dead and down timber and to dispose of it in the ordinary course of trade. This is not the mistake of fact referred to in one of the classes mentioned in the case cited. We do not think that collusion was necessary to make these parties liable. The mistake of the agent or superintendent could not protect the trespasser. This has been held even in the matter of homesteaders unlawfully cutting timber.

The good intention and exercise of judgment to effectuate a desired object could not authorize the agent to go beyond his defined powers.

In *United States* v. *McDougall's admr.* (121 U. S., 89), Wozencraft, an Indian agent, made a contract with McDougall for the delivery of certain cattle to Indians. Suit was brought by McDougall's administrator in the Court of Claims against the United States to recover for the value of the cattle, and it was set up by the claimants that although the instructions to Wozencraft did not extend to or embrace contracts for the subsistence of the Indian tribes in California, such a policy was, under all the circumstances, vital to the ends which those in charge of Indian affairs desired to accomplish, and that information of the proceedings of Wozencraft in making the contracts was given to the proper department at Washington, and that what they did was either approved or was not repudiated. This court asks, What statute, in express words or by necessary implication, invested Wozencraft with power to bind the United States by such a contract?

Various provisions of the statute were cited by the claimants, among others, that it was provided that all merchandise required by any Indian treaty for the Indians, payable after making of such treaty, should be purchased under the direction of the Secretary of the Interior upon certain conditions, and all merchandise should be purchased under the orders of the commissioners by such persons as they should appoint, or by such persons as should be designated by the President for the purpose, etc.; and the superintendent, agent, or subagent, together with such military officer as the President might direct, should

be present to certify to the delivery of all money and goods required to be paid or delivered to the Indians. It was also provided that it should be the general duty of Indian agents and subagents to manage and superintend the intercourse with the Indians within their respective agencies, agreeably to law, who obey all legal instructions given to them by the Secretary of the Interior, Commissioner of Indian Affairs, or the Superintendent of Indian Affairs, and to carry into effect such regulations as might be prescribed by the President. It was argued that these statutory provisions conferred authority upon the officers of the executive department to purchase, without limit as to amount, merchandise required for the making of any Indian treaty; and invested the President, through others, with power to make other purchases on account of the Indians, as well as payment to them, of money or goods. This court, after stating the power of the President under the statute, says: "But no officer of the Government was authorized to bind the United States by any contract for the subsistence of Indians not based upon the appropriations made by Congress. It is not claimed that the agreement between Wozencraft and McDougall was made with reference to such appropriations. On the contrary, Wozencraft and his colleagues were informed by a communication from the Indian Office, under date of June 27, 1851, that 'when the appropriation of $25,000 for holding treaties was exhausted, they should close their negotiations and proceed with the discharge of their duties as

agents simply, as the Department would not feel itself justified in authorizing anticipated expenditures beyond the amount of the appropriation made by Congress.' The findings show that when the written agreement with McDougall was made, Wozencraft and his colleagues knew that the appropriations had been exhausted. Besides, the contract on its face shows that it was made with reference to appropriations to be thereafter made. The parties evidently relied upon Congress recognizing the wisdom and necessity of the policy adopted for the pacification of the Indians in California, and, by legislation, applying the want of authority upon the part of Wozencraft and his colleagues to contract, in behalf of the United States, for the subsistence of the Indians in advance of the ratification of the treaties negotiated with them. That the policy pursued by Wozencraft and his colleagues was the only one that would have given peace to the inhabitants of California; that the Indians were induced by the promises of subsistence held out to them to abandon their lands to the whites and settle upon reservations selected for them, and that the United States thereby acquired title to the lands so abandoned, are considerations to be addressed to Congress in support of a special appropriation to pay the claim of McDougall's administrator."

It is altogether an error to contend that, in this case, value had been added to the property by the work of the defendants, before the conversion, because the defendants had furnished supplies to the Indians during the time of their work. Added value can only be con-

sidered after the delivery which makes the conversion. The advances made to the Indians were to them in part payment under an executory contract. All added value in this case was by the original wrongdoer.

In the *Wooden Ware* case the value of the services of the Indian loggers was paid to them as part of the consideration for the sale to the innocent purchaser. Here the defendants, by furnishing money and supplies to carry on the logging operations, advanced a part of the purchase price and thus increased the magnitude of the trespass beyond what the Indians unaided could have accomplished. This was done contrary to the rules prescribed by the President, which were a part of the law. It is difficult for the unbiased mind to grasp the effect of these distinctions as furnishing a foundation for an argument in favor of the superior equities in the case of plaintiffs in error.

It is a curious feature of counsel's reasoning that he first dwells upon the fact that defendants below had nothing to do with the original trespass, and then asserts an alleged equity, by reason of the fact that money and supplies were advanced to the original trespassers, which should, in his opinion, be credited to his clients, when these very advances made possible the commission of the tort.

There is no necessity to extend the doctrines of the Wooden Ware case. These defendants knew all the relations of the Indians to this property. It is true, as defendants say, that the timber here involved was cut and taken from Government land by Indians, who

were paid for their work by the defendants under contracts entered into before the cutting was begun. They were absolutely bound to know and observe the situation in all its aspects. A failure to require the strictest observance of salutary rules, prescribed as in this case, adds to the gravity of a situation vividly pictured by Justice Miller in the case being considered:

> It has long been a matter of complaint that the depredations upon these lands [i. e., Government lands] are rapidly destroying the finest forests in the world. Unlike the individual owner, who, by fencing and vigilant attention, can protect his valuable trees, the Government has no adequate defense against this great evil. Its liberality in allowing trees to be cut on its land for mining, agricultural, and other specified uses has been used to screen the lawless depredator who destroys and sells for profit.

IV.

OF DIRECTED VERDICTS.

To eliminate all issues of fact, the plaintiff, at the conclusion of the testimony, accepted defendants' admission of the amount of logs taken and their lowest evidence of value, and for the purposes of a motion for a directed verdict conceded that the defendants might be credited with the value of a quantity of logs equal to that named in the contracts (pp. 109–110).

> There is no doubt of the power of the circuit court to direct a verdict for the plaintiff upon the evidence presented in a cause, where it is clear that he is entitled to recover, and no matter affecting his claim is left in doubt to be

determined by the jury. Such a direction is eminently proper, when it would be the duty of the court to set aside a different verdict, if one were rendered. It would be an idle proceeding to submit the evidence to the jury, when they could justly find only in one way. (*North Pa. R. R. Co.* v. *Com. Nat. Bank of Chicago*, 123 U. S., 727; *Anderson County Commissioners* v. *Beal*, 113 U. S., 227, 241.)

Nor are judges any longer required to submit a question to a jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury in finding a verdict in favor of that party. (*Ryder* v. *Wombwell*, Law Rep., 4 Ex., 39; *Giblien* v. *McMullen*, L. Rep., 2 P. C. App., 335.) Formerly it was held that if there was what is called a scintilla of evidence in support of a case the judge was bound to leave it to the jury; but recent decisions of high authority have established a more reasonable rule—that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed.

Improvement & R. R. Co. v. *Munson*, 81 U. S., 442, citing:

Jewell v. *Parr*, 13 C. B., 916.

Toomey v. *L. & B. R. R. Co.*, 3 C. B. N. S., 150.

Wheelton v. *Hardesty*, 8 Ell. & Bl., 266.

Schuchardt v. *Allen*, 1 Wall., 369.

It is true that questions of negligence and contributory negligence are, ordinarily, questions of fact to be passed upon by a jury; yet, when the undisputed evidence is so conclusive that the court would be compelled to set aside a verdict returned in opposition to it, it may withdraw the case from the consideration of the jury and direct a verdict.

Elliott v. *Chicago, M. & St. P. R. R. Co.*, 150 U. S., 245, citing:

Chicago, R. I. & P. R. R. Co. v. *Houston*, 95 U. S., 697.

Schofield v. *Chicago, M. & St P. R. Co.*, 114 U. S., 615.

Delaware, L. & W. R. Co. v. *Converse*, 139 U. S., 469.

Aerkfetz v. *Humphreys*, 145 U. S., 418.

This court, by Justice Miller, in *Pleasants* v. *Fant* (89 U. S., 116, 120), said:

But we are pressed with the proposition that it was for the jury to decide this question, because the testimony received and offered had some tendency to establish a participation in the profits, and the question of liability under such circumstances should have been submitted to them, with such declaration of what constitutes a partnership as would enable them to decide correctly.

No doubt there are decisions to be found which go a long way to hold that if there is the slightest tendency in any part of the evidence to support plaintiff's case, it must be submitted to the jury, and in the present case, if the court had so submitted it, with proper instructions, it

would be difficult to say that it would have been an error of which the defendant could have complained here.

But, as was said by this court in the case of *The Improvement Co.* v. *Munson* (14 Wall., 448), recent decisions of high authority have established a more reasonable rule, that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed.

The English cases there cited fully sustain the proposition (see *Jewell* v. *Parr*, 13 C. B., 916; *Toomey* v. *L. & B. R. Co.*, 3 C. B. (N. S.), 146; *Ryder* v. *Wombwell*, 4 L. R. Exch., 33), and the decisions of this court have generally been to the same effect.

In the case of *Parks* v. *Ross* (11 How., 362) this court held that the practice of granting an instruction like the present had superseded the ancient practice of demurrer to evidence, and that it answered the same purpose and should be tested by the same rules; and in that case it said the question for the consideration of the court was whether the evidence submitted was sufficient to authorize the jury in finding the contract set up by plaintiff. And in *Schuchardt* v. *Allens* (1 Wall., 359) this case is referred to as establishing the doctrine that if the evidence be not sufficient to warrant a recovery, it is the duty of the court to instruct the jury accordingly. * * *

It is the duty of a court, in its relation to the jury, to protect parties from unjust verdicts arising from ignorance of the rules of law and of evidence, from impulse of passion or prejudice, or from any other violation of his lawful rights in the conduct of a trial. This is done by making plain to them the issues they are to try, by admitting only such evidence as is proper in these issues and rejecting all else, by instructing them in the rules of law by which the evidence is to be examined and applied, and finally, when necessary, by setting aside a verdict which is unsupported by evidence or contrary to law.

In the discharge of this duty it is the province of the court, either before or after the verdict, to decide whether the plaintiff has given evidence sufficient to support or justify a verdict in his favor, not whether on all the evidence the preponderating weight is in his favor; that is the business of the jury. But conceding to all the evidence offered the greatest probative force which, according to the law of evidence, it is fairly entitled to, is it sufficient to justify a verdict? If it does not, then it is the duty of the court after a verdict to set it aside and grant a new trial. Must the court go through the idle ceremony, in such a case, of submitting to the jury the testimony on which plaintiff relies, when it is clear to the judicial mind that if the jury should find a verdict in favor of plaintiff that verdict would be set aside and a new trial had? Such a proposition is absurd, and accordingly we hold the true principle to be, that if

> the court is satisfied that, conceding all the inferences which the jury could justifiably draw from the testimony, the evidence is insufficient to warrant a verdict for the plaintiff, the court should say so to the jury.

In *Railroad Co.* v. *Converse* (139 U. S., 469) this was approved. This court (p. 472) said:

> But it is well settled that the court may withdraw a case from them altogether and direct a verdict for the plaintiff or the defendant, as the one or the other may be proper, where the evidence is undisputed or is of such conclusive character that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it.

More than a mere scintilla of evidence is required to justify submitting the issues to the jury, especially where it is met not only by the positive testimony of disinterested witnesses, but also by well-known and recognized physical facts about which there is no conflict. (*Laidlow* v. *Sage*, 158 N. Y., 73.)

See also—

Griggs v. *Houston*, 104 U. S., 553.
Randall v. *Railroad Co.*, 109 U. S., 478, 482.
Marshall v. *Hubbard*, 117 U. S., 415.
Railway Co. v. *Cox*, 145 U. S., 593.
Meehan v. *Valentine*, 145 U. S., 611, 618.
Thompson v. *Pioneer Press Co.*, 37 Minn., 285.
Oscanyan v. *W. R. Arms Co.*, 103 U. S., 261.
Insurance Co. v. *Doster*, 106 U. S., 30, 32.
Arthur v. *Morgan*, 112 U. S., 495.
Herbert v. *Butler*, 97 U. S., 319, 320.

Bevens v. *United States*, 13 Wall., 56.
Walbrun v. *Babbitt*, 16 Wall., 577.
Hendrick v. *Lindsay*, 93 U. S., 143.

In the case of *Northwestern Fuel Co.* v. *Danielson* (57 Fed. Rep., 920) the circuit court of appeals for the eighth circuit said:

> Where there is no dispute about the facts, and they are such that but one conclusion can fairly be drawn from them *by reasonable men*, it is the duty of the court to declare that conclusion to the jury. *If the evidence is of such a conclusive character that the court, in the exercise of a sound judicial discretion*, would be bound to set aside a verdict returned in opposition to it, it is its duty to direct a verdict for the plaintiff or the defendant, as may be proper. *Chicago, St. P., M. & O. Ry.* v *Belliwith*, 83 Fed. Rep., 437, 440.

A JOINT JUDGMENT WAS CORRECT.

Counsel for plaintiffs in error asks this court to consider a question relative to the joint character of the tort involved in this cause. No such question was presented to either the trial court or the circuit court of appeals. It is true that defendants tendered such an issue in their pleadings, but upon the second trial of the case they waived the question and admitted that their liability, if any, was joint. In his instructions to the jury (pp. 109, 110) the trial judge states the questions presented and argued, and no suggestion is found concerning the several or joint character of the conversion. The specification of error, found in the brief of plaintiffs in error, upon this point is not based on any of the

assignments of error filed at the time of securing the writs of error either to the trial court or to the court of appeals. (See those assignments, pp. 125 and 138.) In the fourteenth assignment of error (p. 141) the questions, which the defendants below conceived the judge should have submitted to the jury, are particularly pointed out and no suggestion of the present alleged error is found, nor was it argued in either the circuit court or the court of appeals. The appellate jurisdiction of the circuit court of appeals is in effect eliminated if issues neither before that court nor before the trial court are to be determined here.

It is a general rule that an objection to want of proof of a fact, which might be met at once, must be taken at the trial or it will be considered as waived, except as to matters going to the jurisdiction of the court. (*O'Reilly* v. *Campbell*, 116 U. S., 418.)

An objection to a variance between allegations and proof, not taken at the trial, can not avail in the higher court, if it could have been obviated in the court below. (*Roberts* v. *Graham*, 6 Wall., 578.)

In the case of *Camden* v. *Stewart* (144 U. S., 104) this court stated, that, for want of a proper assignment of error, it would have been justified in refusing to take cognizance of the case, and there being no assignment of error, if the evidence was inconclusive, the presumption in favor of the correctness of the decision of the lower court must prevail, and this rule was applied even to the presumption in favor of a master's report.

There is, however, in the record ample evidence of the joint character of the wrong complained of; in fact, while upon the stand as witnesses, the defendants admit that they were jointly interested in taking the logs.

On page 96 of the record the defendant, C. A. Smith, who was a member of the firm of C. A. Smith & Co., and also secretary and treasurer of the Pine River Logging and Improvement Company, testifies as follows:

> During the logging season of 1891–92 *the defendants* established a logging-supply bureau at Deer River, and Mr. Meldahl had charge of it, representing *the defendants.* The logs cut under these five contracts were divided equally between C. A. Smith & Co., and J. B. Bassett & Co. The Pine River Logging and Improvement Company was practically controlled by C. A. Smith & Co. *The defendants* employed Henry McAllister and Arno Mereen in the various camps during that winter. The log mark CAS, which was used on a large number of these logs, was the property of C. A. Smith & Co. prior to these logging operations. The mark E girdle B was put on all the long logs cut in all these cuttings.

The same defendant amplifies some of these facts on page 101 of the record.

William L. Bassett, another of the defendants and a member of the firm of J. B. Bassett & Co., testifies to the same effect (pp. 106–108).

It may be said by the plaintiffs in error that the words

"defendants" and "we" as used by these witnesses do not necessarily include all of the defendants, but it is to be observed that these two witnesses together represent all the defendants; that both of them admit that the agents Meldahl, Mereen, and McAllister, who were engaged in the immediate supervision of the transactions for the plaintiffs in error upon the reservations, were equally the agents of their respective firms, and they both likewise admit that the logs were divided equally between them; that the log marks C A S, which indicated the property of C. A. Smith & Co., were placed upon some logs in all the cuttings; that when the defendants, C. A. Smith and W. L. Bassett, visited the reservation during the cutting of this timber, each showed an equal interest in the logs supposed to be cut under the contracts of the other as in those cut under his own contracts, and the witness Bassett admits (p. 108) that his firm received a part of the 8,000,000 feet which defendants claimed were cut under the Fairbanks contract in which, on its face, his firm had no interest. Further, defendants themselves proved that C. A. Smith & Co. paid the balance due on the contracts of the logging company (defendants' Exhibit 3, p. 119), and that the same firm was engaged in discounting the time checks used in all the cuttings (Exhibits F/1, F/2, and F/3, pp. 118, 119). These facts are all shown by the testimony of the defendants themselves, and they offered not one word of evidence to rebut, or in any way modify the presumption, arising from their conduct, that they were all acting jointly.

A person who consents to the commission of a tort, or aids or abets it, is guilty of the wrongful act in like degree with any other tort feasor. (1 Chit. Plead., 180; *Sanborn* v. *Sturtevant*, 17 Minn., 174, 179; *Cleak* v. *Whitaker*, 19 Conn., 319; 48 Am. Dec., 160.)

If this point is before the court, which is strenuously denied, there is ample testimony to make a *prima facie* case of joint conversion. It was not contradicted, and there was, therefore, no issue to submit to the jury.

The objection now made by counsel for the plaintiffs in error is in the nature of a demurrer to the evidence, and a general demurrer to evidence will not avail. The specific defect must be pointed out and preserved in the record from the lower court. (*Van Stone* v. *Stillwell*, 142 U. S., 128.)

None of the general assignments to the direction of the verdict, or to the entry of judgment upon that verdict, are sufficient to cover this point, which, as we have seen, was not suggested to either the trial judge or the judges of the court of appeals.

COSTS OF THE CIRCUIT COURT MAY BE TAXED IN FAVOR OF THE UNITED STATES.

In the case of the *United States* v. *Davis* (54 Fed., 147) the court of appeals to which the writ of error in this case is directed, said:

> It will not be questioned that generally costs may now be awarded to the United States when it is the prevailing party.

It is conceded by counsel for the plaintiffs in error that it is the general practice of circuit courts to allow

costs in favor of the United States, and the numerous cases to this effect will not therefore be reviewed here. In the case of the *United States* v. *Sanborn* (135 U. S., 271) the question was directly before this court, and the lower court was reversed because it had not taxed certain items on behalf of the United States. This case would seem to dispose of counsel's contention, particularly as it has been repeatedly and uniformly followed since the decision was handed down.

THE ITEM OF $356.69, FOR THE REPORTER'S TRANSCRIPT OF THE RECORD, NECESSARILY USED BY THE PLAINTIFF IN PREPARING ITS BILL OF EXCEPTIONS ON THE FORMER APPEAL, WAS PROPERLY ALLOWED.

Paragraph 3 of rule 31 of the circuit court of appeals is as follows:

> The cost of the transcript of the record from the court below shall be taxable in that court as costs in the case.

The clerk of the circuit court, who originally taxed the costs, as well as counsel for the United States, understood this rule to apply to the fees of the reporter for furnishing a transcript used in preparing the record for the appellate court, as well as to the costs of the clerk of the circuit court for certifying the record. This is believed to be the uniform practice in the eighth circuit, and it is certainly well settled in the courts of the State of Minnesota. (*In re Ovid Pinney*, 27 Minn., 280; *Linne* v. *Forrestal*, 51 Minn., 249.)

The only case cited by the plaintiffs in error in opposition to this view is that of *Monahan* v. *Godkin*

(100 Fed., 196). This is the decision of a trial judge never sustained, as far as counsel for defendant in error is aware, by any appellate court.

The only case from an appellate court cited by Judge Seaman, in rendering the decision last referred to, is that of *The William Branfoot* (52 Fed., 390), and that case is not in point, for it appears that the disbursement for the transcript of the reporters' minutes, there attempted to be taxed, was incurred for the convenience of counsel in trying the case. There is no suggestion that the copy of the stenographer's notes, for which this disbursement was made, was used in or made a part of the record for an appeal.

V.

The contention of counsel that, in any event, the defendants should be credited with the 10 per cent stumpage, paid to the poor fund for the Indians, is clearly met in the language of Judge Thayer, as follows:

> We are unable to perceive any legal ground upon which payments that they may have made into the Indian poor fund for the support of indigent Indians can be accepted or regarded as payments made to the United States for its benefit. Such payments stand on the same footing as a payment made to a third party, inasmuch as the Government received the money simply as a trustee for the benefit of poor Indians and has doubtless expended it for their benefit.

The other questions alluded to in the brief of plaintiffs in error do not appear to be material to the determination of the issues before this court.

For the convenience of the court we have added as an appendix to this brief the rules prescribed by the President pursuant to statute for cutting dead and fallen timber, and also a copy of one of the contracts (all of which are in the same general form) relied upon by plaintiffs in error as a justification of their acts.

JOHN E. STRYKER,
Special Assistant United States Attorney.
ROBERT A. HOWARD,
Special Assistant United States Attorney.

JOHN K. RICHARDS,
Solicitor-General.

APPENDIX.

REGULATIONS.

First. That each Indian who engages in the work of preparing for the market the dead and down timber on his reservation during the current fiscal year shall provide his own logging outfit and supplies.

Second. No Indian to be allowed to log who has children of school age not attending school a reasonable length of time each year, unless in the opinion of his agent some good reasons exist in special cases which are sufficient to exempt particular persons from this requirement; otherwise, every Indian on the reservation not well employed should be permitted and encouraged to engage in the work, and no favoritism shall be shown by the agent in his management of the business.

Third. A reliable and otherwise properly qualified white man to be detailed, if any such can be spared from the agency employee force; or if no regular agency employee is available, then to be appointed by authority of the Secretary of the Interior and to be paid a reasonable salary from the proceeds of the sale of the logs, for such time as service may be actually necessary, whose duty it will be to go into the woods with the loggers and superintend and direct their labors, to the end that no green or growing timber may be cut, and that no live trees are damaged in any manner so as to cause them to die, that they may be marketed under the provisions of the act in question, and to inspect the scaling of the logs.

Fourth. With the exception of a superintendent provided for by the preceding item, and in cases where persons of sufficient knowledge and skill for foremen and blacksmiths can not be found among the Indians, all white labor to be excluded from the reservation.

Fifth. One-half of the cost of scaling to be paid for by the loggers, and one-half by the purchasers of the logs.

Sixth. The logs shall be cut and banked or otherwise made ready for sale by the Indians, under the supervision of the superintendent and direction of the agent, at such place or places as he shall direct, and shall be sold at public sale to the highest bidder either by auction or by calling for sealed proposals, at the discretion of the Secretary of the Interior, in such lots as shall be most expedient, and under the personal direction of the agent, for cash, after at least two weeks' notice by publication in newspapers at the places where the usual markets for logs exist, and where best calculated to give notice; also, by such other means as shall give greatest publicity.

Seventh. No sale of the logs to be valid until approved by the Commissioner of Indian Affairs.

Eighth. Ten per cent of the gross proceeds derived from the sale of the logs to go to the stumpage or poor fund of the tribe, from which the old, sick, and otherwise helpless may be supported.

Ninth. All expenses of sale, such as advertising, telegraphing, one-half of the cost of scaling, and 10 per cent of the gross proceeds of the sale, for the stumpage or poor fund, to be deducted, and the net proceeds remaining to be divided and paid by the agent to the individuals or companies of the tribe in exact proportion to the scale of logs banked by each.

(Transcript, pp. 112 and 113.)

THE CONTRACT.

In and for the consideration below named, Schaggeeshig, Indian, party of the first part, hereby enters into an agreement with J. B. Bassett & Co., as parties of the second part, to cut, haul, and deliver during the season of 1891 and 1892, on or tributary to the Mississippi River, two hundred fifty thousand feet, more or less, of pine saw logs, to be cut on the Indian reservation, from dead and down timber, under the supervision of the United States Indian agent or his deputies.

Said logs to be well cut and well marked with the following bark mark, FX, and the following stamp mark, F. Said party of the first part further agrees to cut, haul, and place around said logs a sufficient amount of timber, suitable for boom sticks, for the booming of the said logs into rafts of convenient size for driving across the flowage of the Government dam.

Said party of the first part further agrees to hold the second party harmless from any and all claims for labor or otherwise which are or may be lienable claims, and attached upon the said logs, and that all labors must be paid in full.

Said party of the first part further agrees that the second parties will pay the United States Indian Department or its authorized agents the sum stipulated by said Department to be paid to it as stumpage for said timber, which amount, being ten per cent of purchase price, shall be deducted from the price per thousand feet below named.

As a consideration for this agreement, and for the above-named services, the said J. B Bassett & Co. hereby agrees to pay the said first party the uniform price of four dollars per thousand feet, board measure, for said logs (and one-half scalage), so cut, marked,

hauled, and landed in accordance with the following terms: After fifty thousand feet of logs have been cut, marked, and scaled, then the said second parties will pay the said first party the sum of one hundred dollars (i. e., two dollars ($2.00) per thousand feet), to enable them to purchase supplies and pay the necessary expenses. As soon as another fifty thousand (50,000) feet shall have been cut, marked, hauled, and scaled, the said second parties will pay the said first party a further sum of one hundred dollars (i. e., two dollars per thousand feet). When one hundred thousand feet shall have been cut, marked, hauled, and scaled, the second parties agree to pay from time to time such further amounts as may be desired by the agent as will make, with advanced payments already made, the sum of $2.00 per thousand feet for any and all logs delivered on above lands as fast as scaled, and the further sum of one dollar per thousand feet at the end of the logging season on all logs that show by scale to have been cut, marked, and hauled, and the balance sixty days thereafter.

It is mutually stipulated and agreed by and between the parties hereto that the sale of the surveyor-general for the scaling of logs and lumber in the second district Minnesota, or his deputies, shall be conclusive and final between said parties.

It is mutually understood and agreed by the parties to this contract that the logging operations shall be under the supervision of the U. S. Indian agent for the White Earth Indian Agency, of Minnesota, and that all payments mentioned herein shall also be under his supervision. The fulfillment of all agreements under this contract shall be in conformity with the regulations prescribed by the President of the United

States, dated Oct. 17, 1890, to govern the logging by the Indians, in the Indian reservation of White Earth Agency, of Minnesota.

SHOCAGGEESHIG (his x mark).
J. B. BASSETT & CO.,
By WILLIAM L. BASSETT.

In presence of—
A. R. ROGERS.
HENRY A. MCALISTER.

STATE OF MINNESOTA,
County of Itasca, ss:

On the 29th day of Oct., A. D. 1891, before me, a notary public in and for the State of Minnesota, personally appeared Shocaggeeshig, by me known to be the party who executed the foregoing and within instrument, and acknowledged that he executed the same as his free act and deed.

[SEAL.] A. R. ROGERS,
Notary Public, Minnesota.

STATE OF MINNESOTA,
County of Hennepin, ss:

On this 3d day of November, A. D. 1891, before me, a notary public within the said Hennepin County, State of Minnesota, personally appeared William L. Bassett, known to be a partner in the firm of J. B. Bassett & Co., with full power to execute contracts, and who executed the foregoing and within instrument and acknowledged that he executed the same freely and voluntarily for said J. B. Bassett & Co., of which firm he is a partner.

[SEAL.] A. R. ROGERS,
Notary Public, Hennepin County, Minnesota.

STATE OF MINNESOTA,
County of Itasca, ss:

On this 29th day of October, A. D. 1891, before me personally appeared Shocaggeeshig, who, being duly sworn, deposes and says that he is of Indian descent, and that he has been, and that he now is, living upon and enjoying the privileges of the Mississippi River Indian Reservation, and as such is entitled to the rights and considerations as granted him by the Government of the United States.

SHOCAGGEESHIG (his x mark).

Witness as to mark:
A. R. ROGERS.

[SEAL.]

A. R. ROGERS,
Notary Public, Minn.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
Nov. 27, 1891.

Agreeable with authority of the President, indorsed (November 24th, 1891) on Department letter to him of November 16th, 1891, the within contract is hereby approved.

T. J. MORGAN,
Commissioner.

DEPARTMENT OF THE INTERIOR,
Nov. 27, 1891.

Approved.

JOHN W. NOBLE, *Secretary.*

(Transcript, pp. 45–47.)

O

Supreme Court of the United States.

No. 250.—October Term, 1901.

The Pine River Logging and Improvement Company et al., Plaintiffs in Error, vs. The United States. } In error to the United States Circuit Court of Appeals for the Eighth Circuit.

[June 2, 1902.]

This was an action in the nature of trover begun in the Circuit Court for the District of Minnesota by the United States against the Pine River Logging and Improvement Company, a corporation, (hereinafter called The Logging Company,) Joel B. Bassett and William L. Bassett, copartners under the name of J. B. Bassett & Co., and John L. Pillsbury (for whom his administrators have since been substituted) and Charles A. Smith, copartners as C. A. Smith & Co., defendants, to recover damages for an alleged wrongful entry by the defendants upon an Indian reservation, and the cutting and removing of certain pine timber thereon.

The complaint, which contains nine counts, charges in substance that nine different parties did, with the consent and at the request of defendants, wrongfully enter upon certain lands of the United States known as the Mississippi Indian Reservation, and at the special instance and request of the defendants fell and cut into logs certain pine trees, which they delivered to the defendants, who thereupon caused the logs to be floated down the river to the city of Minneapolis, to be there manufactured into lumber, which they had subsequently sold and appropriated the proceeds thereof to their own use.

The answers filed by the defendants, The Logging Company and the Bassetts allege in substance the following facts: That the logs referred to were cut under and by virtue of certain contracts which had been entered into with individual Chippewa Indians for the cutting of dead and down timber found on the reservation; that said contracts had been executed in pursuance of an act of Congress, approved February 16, 1889, (25 Stat. 673,) in relation to the cutting of timber on Indian lands; that payment for the logs so cut and removed had been made in full to the United States, and to the proper Indian agent, in accordance with the provisions of said contracts; that said logs were so cut by the Indians and delivered to and accepted by the defendants in good faith, in the honest belief that said logs had been lawfully cut under their contracts from dead and down timber, and that defendants were entitled to the same and became owners thereof

upon the delivery of the logs and upon making the aforesaid payments; that after the logs had been delivered to the defendants and before they were floated down the river to Minneapolis, the United States, through its proper officer, had seized and taken possession of the logs, claiming that they were cut from green and growing timber and not from dead or down timber; that thereafter, for the purpose of preserving said logs and realizing their full value for the party who should ultimately be determined to be the owner, a contract was entered into between the United States on the one hand and The Logging Company and J. B. Bassett on the other, which provided in substance that the defendants might drive the logs to Minneapolis without affecting the possession of the United States or the interest of any of the parties in the logs, and that after they had been driven to Minneapolis the defendants executed and delivered to the plaintiff a bond conditioned to pay any judgment that might be rendered against the defendants by the United States on account of the cutting of their logs. One of these bonds was executed by The Logging Company as principal, and the other by the firm of J. B. Bassett & Co. It was next set up in the answer of The Logging Company that the United States had accepted the bond in lieu of the logs, and that, relying upon said acts of the complainant, The Logging Company had disposed of the logs to others. It was then again specifically set up in the answer, as to the fourth, seventh and eighth counts of the complaint, that the claim of the United States was solely against J. B. Bassett & Co., and not against The Logging Company; that the claim set up in the first, second, third, fifth and sixth counts was solely against The Logging Company, and that there was therefore a misjoinder of causes of action in improperly uniting in one complaint causes affecting solely The Logging Company and other causes of action affecting solely the firm of J. B. Bassett & Co.

A separate answer was filed by the firm of C. A. Smith & Co., who admitted receiving from The Logging Company a certain amount of the pine saw logs described in the complaint, and that they manufactured the same into lumber, and disposed of it in the ordinary course of their business; that the amount of the lumber so manufactured was 15,628 feet, and that the value of the same was not greater than the sum of $132.84; that the defendants in receiving and manufacturing said logs honestly believed that The Logging Company was the owner and entitled to dispose of them. They also pleaded a misjoinder and non-liability for the acts of the other defendants.

The answer of The Logging Company admitted in substance that, under and by virtue of the three contracts between itself and the Indians, it had received into its possession, converted into lumber, and ultimately sold pine saw logs, cut upon Indian reservations, which had yielded in the aggregate 13,463,400 feet. The defendants, J. B. Bassett & Co., likewise admitted

that under two contracts with the Indians they had received saw logs which had yielded in the aggregate 4,136,860 feet of lumber.

The United States demurred to parts of these answers, and replied to other parts, admitting that The Logging Company and Bassett & Co. had each entered into contracts with certain Indians, but averred that all the logs cut under some of the contracts and a large portion of the logs cut under other contracts were cut from pine trees that were alive and standing, while the contracts authorized only the cutting of dead and down timber.

The case being at issue upon these pleadings, The Logging Company and Bassett & Co. moved for a judgment against the government upon the pleadings for the sole reason, as stated in the motion, that on the facts admitted the plaintiff was not entitled to maintain an action of trover or conversion against these defendants, or either of them, for the matters and things set out in said cause of action; but that the remedy of the government was upon the bonds given when the logs were surrendered to the defendants. This motion was sustained by the Circuit Court and a judgment entered against the United States, which, however, was reversed by the Court of Appeals, holding that neither of the bonds became available to the United States until a judgment had been obtained in its favor. The case was remanded for a new trial. (78 Fed. Rep. 319.)

Upon the case being sent back to the Circuit Court there was a second trial, which also resulted in a judgment in favor of the defendants. The Court of Appeals reversed this judgment upon exceptions taken by the United States at the trial. (89 Fed. Rep. 907.)

A third trial of the case resulted in a verdict, by direction of the court, in favor of the United States for $88,269.94. This judgment was affirmed by the Circuit Court of Appeals. Whereupon a writ of error was sued out from this court.

Mr. Justice Brown delivered the opinion of the Court.

This case was tried before a jury upon the theory that the defendants went far beyond the terms of their contracts with the Indians, and cut not only a large excess in quantity, but selected a quality of timber wholly unauthorized by the contracts, or by the acts of Congress, or the regulations of the President in connection therewith. The questions to be considered arise upon objections to the testimony and the instruction of the court to the jury to return a verdict for the plaintiffs.

It is conceded that the fee to the lands comprised within Indian reservations is in the United States, subject to a right of occupancy on the part of the Indians, and that the unauthorized cutting of timber upon Indian reservations is not only unlawful, (*United States* v. *Cook*, 19 Wall.

591; *Northern Pacific Railroad* v. *Lewis*, 162 U. S. 366,) but is made a criminal offense by the act of June 4, 1888. (25 Stat. 166.) But by an act of Congress passed February 16, 1889, (25 Stat. 673,) it is provided: "That the President of the United States may from year to year in his discretion, under such regulations as he may prescribe, authorize the Indians residing on reservations or allotments, the fee to which remains in the United States, to fell, cut, remove, sell or otherwise dispose of the dead timber standing or fallen, on such reservation or allotment, for the sole benefit of such Indian or Indians. But whenever there is reasonable cause to believe that such timber has been killed, burned, girdled or otherwise injured for the purpose of securing its sale under this act, then in that case such authority shall not be granted."

It will be observed that by this statute no general authority is given to Indians to cut timber upon their reservations. The act contemplates that the authority shall be temporary only, "from year to year," and it is further limited to "dead timber standing or fallen," and that it shall be disposed of solely for the benefit of the Indian or Indians to whom the authority is given.

Pursuant to this act certain regulations were prepared by the Secretary of the Interior, approved by the President, and extended to the Indians of the Chippewa reservation in the State of Minnesota. These regulations provided that each Indian who engaged in the work should provide his own logging outfit and supplies; that no Indian should be allowed to log who has children of school age, but not attending school, unless in the opinion of his agent some good reasons existed in special cases which were sufficient to exempt particular persons from this requirement; otherwise, every Indian on the reservation, not well employed, should be permitted and encouraged to engage in the work; that all cutting should be done under the superintendence and direction of a competent white man, who should go into the woods with the Indians, "to the end that no green or growing timber may be cut, and that no live trees are damaged in any manner, so as to cause them to die; . . . and to inspect the scaling of the logs;" that with the exception of a superintendent and of foremen and blacksmiths, all white labor was to be excluded from the reservation; that the logs cut should be sold at public sale to the highest bidder, either by auction or by calling for sealed proposals, at the discretion of the Secretary of the Interior, after at least two weeks' notice by publication in the newspapers, and no sale of the logs should be valid until approved by the Commissioner of Indians Affairs; and that ten per cent of the gross proceeds derived from such sale of the logs should go to the stumpage or poor fund of the tribe, from which the old, sick and otherwise helpless might be supported.

The timber in this case was cut under five different contracts made between individual Indians and the defendants, all of which were limited

to dead and down timber, to be cut during the season of 1891 and 1892. The first provided for 250,000 feet; the second for 500,000 feet; the third for 500,000 feet; the fourth for 1,000,000 feet, and the fifth for 500,000 feet. The whole amounted to 2,750,000 feet. These contracts were approved by the Commissioner of Indian Affairs, and, although in some of their provisions, they differed from the general regulations above stated, which provided for a public sale of logs at auction or under sealed proposals, they must be regarded as superseding those regulations in that particular, and as constituting new regulations approved by the President and Commissioner of Indian Affairs.

The object of the statute, as interpreted by these regulations, was evidently to permit deserving Indians, who had no other sufficient means of support, to cut for a single season a limited quantity of dead and down timber under the superintendence of a properly qualified white man, and to use the proceeds for their support in exact proportion to the scale of logs banked by each, provided that ten per cent of the gross proceeds should go to the stumpage or poor fund of the tribe, from which the old, sick and otherwise helpless might be supported. The rights of the government to the unimpaired value of the land and to the standing timber were carefully guarded by the proviso that no green or growing timber should be cut, and no live trees damaged, so as to cause them to die, that they might be marketed under the provisions of the act. Nothing can be plainer than that there was no intention on the part of Congress or the President to authorize promiscuous logging operations, or the felling of live standing timber, or that a few Indians should be permitted to monopolize the proceeds, but that they should be divided among the individuals of the tribe in proportion to the scale of the logs banked by each.

1. The first assignment of error takes exception to the action of the Circuit Court in instructing the jury to return a verdict for the United States, because it required The Logging Company to become responsible for, and pay the obligations of, Bassett & Co., and required that firm to pay the obligations of The Logging Company, and also required the firm of C. A. Smith & Co. to pay the obligations both of The Logging Company and Bassett & Co., when there was no evidence in the case to justify the court in holding any of the parties liable for the obligations of the others; or if such evidence existed at all, it was a question of fact for the jury.

The difficulty with this assignment is, that no such point appears to have been taken upon the trial of the case in the Circuit Court. The bill of exceptions shows that when the plaintiff rested, defendants moved the court that the plaintiff "elect as to the time and place of the conversation (conversion) upon which it relies," and that plaintiff thereupon elected to take the value of the logs in the spring of of 1892 as they were

at the time of the seizure. Upon the conclusion of the entire testimony plaintiff moved the court to strike out all the evidence offered by the defendants with reference to their good faith in the transactions, which the court denied, and plaintiff excepted; and thereupon the court instructed the jury to return its verdict in favor of the plaintiff, to which an exception was also taken. No such objection upon the ground of misjoinder was taken in the assignment of errors filed in the Circuit Court of Appeals to review that judgment, or in the original assignment of errors filed in this court and incorporated in the record. It would appear that the objection was made on behalf of the defendants in the first trial of the case, inasmuch as it is mentioned in the first opinion of the Circuit Court of Appeals. (78 Fed. Rep. 320.) It will be remembered that upon this first trial the case was submitted upon the pleadings alone, defendants taking an objection in the nature of a demurrer that, upon the facts admitted by the pleadings, the government could not recover, but was relegated to an action upon the bonds given when the logs were surrendered to the defendants. The Circuit Court of Appeals held that the complaint did not disclose a misjoinder of causes of action, and also that the judgment rendered by the Circuit Court was in such form that, if sustained, it would bar a subsequent suit against either of the defendants for a wrongful conversion of the property. The point was therefore held not to be well taken, and from that time seems to have been waived or abandoned, as it does not appear to have been raised upon the second or third trials.

This clearly precludes the defendants from raising the question at this stage of the case. It is well settled in this court that an objection that the evidence does not support a joint action against all of the defendants—in other words, a variance between the pleadings and proofs—is one which should be taken at the trial, and cannot be raised for the first time in the appellate court. In *Roberts* v. *Graham*, (6 Wall. 578,) it was said that an objection of variance between the allegations and proofs must be taken when the evidence is offered, and will not even be available upon motion for new trial. See also *O'Reilly* v. *Campbell*, (116 U. S. 418;) *Patrick* v. *Graham*, (132 U. S. 627;) *Boston & Albany R. R. Co.* v. *O'Reilly*, (158 U. S. 334.)

But, in addition to this, the record is by no means barren of evidence of a joint responsibility. While the contracts with the Indians were separately made by each defendant, and their accounts of logs cut and money paid were kept distinct from each other, and each averred that it had nothing to do with the contracts of the other, two of the defendants testified that the logs cut under the five contracts were equally divided between C. A. Smith & Co. and J. B. Bassett & Co., and not according to the amounts named in the contracts; that The Logging Company was practically controlled by C. A. Smith & Co., and that the logging operations

were conducted under the supervision of three men who were acting as agents of these firms. We do not undertake to say that there was not evidence upon this point which, if the attention of the court had been called to it, should not have been submitted to the jury; but as the question was not made in the Circuit Court or in the Court of Appeals it is too late to raise it upon a writ of error from this court.

2. By the second assignment it is insisted that the court should either have instructed the jury, or left to them to determine, that under the contracts between The Logging Company and Bassett & Co. respectively on on the one hand, and the Indians on the other, as those contracts had been construed and acted upon by all parties in interest, including the United States, these companies respectively had a good title to all the dead and down timber delivered to them by the Indians under the contracts, without regard to the specific quantity of timber mentioned therein.

In two of the contracts the designation of the quantity of timber to be cut is preceded by the word "about," and in the other three is followed by the words "more or less." It is contended that by the use of these words the contracts were susceptible of a wide latitude of construction, and if the parties themselves disregarded the limitations, the court, in interpreting those contracts, will adopt the construction given them by the parties interested.

There is no doubt whatever of the general proposition that where the words "about" or "more or less" are used as estimates of an otherwise designated quantity, and the object of the parties is the sale or purchase of a particular lot, as a pile of wood or coal, or the cargo of a particular ship, or a certain parcel of land, the words "more or less," used in connection with the estimated quantity, are susceptible of a broad construction, and the contract would be interpreted as applying to the particular lot or parcel, provided it be sufficiently otherwise identified. This doctrine is well illustrated in the case of *Brawley* v. *United States*, (96 U. S. 168,) where the contract was to deliver to a military post 880 cords of wood, "more or less, as shall be determined to be necessary by the post commander, for the regular supply, in accordance with army regulations and the troops and employes of the garrison of said post." It was held that the latter were the determinative words of the contract, and the quantity, designated at 880 cords, was to be regarded merely as an estimate of what the officer making the contract at the time might suppose would be required; and that the government was not liable for more than forty cords of wood which was accepted by the officers. So in *Watts* v. *Camors*, (115 U. S. 353,) it was held that where a ship was described in a charter party as of the burden of 1,100 tons, "or thereabouts," registered measurement, the charterer was bound to accept her, although her registered measurement, unknown to both parties, was 1,203 tons.

But, upon the other hand, if the agreement be to manufacture, furnish or deliver certain property not then in existence, or to be taken from a larger quantity, the addition of the words "more or less" will be given a narrow construction, and held to apply only to such accidental or immaterial variations in quantity as would naturally occur in connection with such a transaction. (*Norrington* v. *Wright*, 115 U. S. 188.)

The contracts in this case unquestionably belong to the latter class. They were contracts to cut and deliver a certain quantity of dead and down timber, and if construed, as is claimed, to authorize the cutting of six times that amount, the quantity might as well have been omitted altogether. The argument of the defendants in that connection is virtually an insistence that the specification of the quantity to be cut should be discarded, and as the payment was stipulated at a certain price per thousand feet, the contract should be interpreted as authorizing the cutting of an unlimited quantity, so long as the price paid was that stipulated in the contract.

Defendants' main reliance, however, is upon the construction of these contract by the parties themselves, including the United States, and in support of their position they invoke the general rule that where both parties to a contract have by their subsequent conduct given it a construction different from what the law might have given it, the courts will adopt that construction; and that the statutes under which the cutting was done, the correspondence between the Secretary of the Interior, and the President upon the subject, the regulations which the latter adopted for carrying the act into effect, and the conduct of the parties to the contracts, tend to show that they were intended to authorize the removal of all the dead and down timber on the public land described in them. Undoubtedly there is some support for the proposition in the disregard by the parties to the contract of the limitations of quantity to be cut; but upon the statute and regulations we put, as before stated, an entirely different interpretation. The argument overlooks the fact that the Indians had no right to the timber upon this land other than to provide themselves with the necessary wood for their individual use, or to improve their land, (*United States* v. *Cook*, 19 Wall. 591,) except so far as Congress chose to extend such right; that they had no right even to contract for the cutting of dead and down timber, unless such contracts were approved by the Commissioner of Indian Affairs; that the Indians in fact were not treated as *sui juris*, but every movement made by them, either in the execution or the performance of the contract, was subject to government supervision for the express purpose of securing the latter against the abuse of the right given by the statute. It is true that, as a matter of fact, the work was done under these contracts under the superintendence of a government agent, who personally directed what timber should be cut, and when the timber had been cut and a final settlement was made with the Indians, the

amounts found to be due them were paid to the Indian agent, who, with the contracts before him, must have known when he received his payments the quantity of timber which had been cut under the different contracts.

It is unnecessary to inquire what excuses may be made by these officers for thus indirectly approving the construction put upon the contracts by the parties interested, since they could not bind the government in this particular. With the contracts before them they had but one duty, and that was to see that they were honestly and faithfully carried out according to their spirit and letter. No authority had been given them to extend the contracts either as to the quantity or quality of timber to be cut. In fact, they were placed in charge of the operations for the express purpose of seeing that there should be no violation of the contracts in these particulars. They, as well as the parties thereto, were equally bound by its provisions. No discretion had been given them to waive or alter the contracts in any particular. No conduct of theirs can estop the government from asserting its rights to recover for timber cut beyond the quantity and quality specified in the contract. (*Lee* v. *Monroe*, 7 Cranch, 366; *The Floyd Acceptances*, 7 Wall. 666; *Whiteside* v. *United States*, 93 U. S. 247.) We are therefore of opinion that the defendants cannot take refuge under the consent or acquiescence of the government agent in the disregard of these contracts.

To give to them the construction claimed by defendants is not only inconsistent with their language, but with the regulations of the President, the design of which was to permit every Indian on the reservation to engage in the work of cutting dead and down timber, and that no one should obtain more than his fair share of such privilege. The timber in question, if allowed to lie upon the land, would simply rot and go to waste, and its removal and sale were no detriment to the land or the government; and this right, if judiciously exercised, would give support to a good many Indians who had no other means of earning a living. The regulations, however, properly limited the right to Indians "not well employed," and provided that no favoritism should be shown by the agent in the management of the business, and that no Indian should be permitted to monopolize the business for his own profit. In short, the object of these regulations was to prevent exactly what was done in this case, that is, the appropriation to a few Indians of the benefits of the act to the exclusion of the many. It will be observed that while the defendants were interested in all these contracts, care was taken that one contract should not be made for the delivering of the gross amount of logs, but that five different contracts should be entered into with different Indians, undoubtedly for the very purpose of preventing a monopoly by a single person, the largest of these contracts being only for a million feet.

3. The third assignment of error is directed to the proper measure of damages, which were assessed at the value of the logs as they were banked upon the streams and lakes in the neighborhood of where they were cut. It is insisted that the proper measure was the value to the government of the timber before the Indians or the contractors had, by their labors, added to that value.

To determine the proper measure of damages, it is necessary to consider the exact relation of the defendants to this timber. They were certainly not innocent purchasers for value of the logs that were cut. All the logs were cut under contracts with individual Indians, by which the latter had agreed to cut, haul and deliver to the defendant, upon the Mississippi River, or waters tributary thereto, an aggregate of 2,750,000 feet of dead and down timber, defendants agreeing to pay to the Indian Department ten per cent of the purchase price as stumpage for such timber, which should be deducted from the price of $4 per thousand agreed to be paid. As a matter of fact, there were delivered on these contracts over 17,000,000 instead of 2,750,000 feet contracted for, a large proportion of which seems to have been cut from green and growing timber, though the quality of the timber is not in issue here. Defendants could not have failed to know that they were paying for a very much larger amount than they had agreed to buy, or than the Indians had any power to sell. They knew that their contracts had been approved by the Commissioner of Indian Affairs upon the basis of a certain quantity of dead and down timber, and that if the agent of the Indian Department had acquiesced in the amount and quality of timber actually cut, he had exceeded his authority, and his acts were not binding upon the government. Granting that the question that what constituted "dead and down" timber might be the subject of a *bona fide* dispute, there was no question but that the amount of timber received grossly exceeded the amount contracted for, and that an agreement to cut 2,750,000 feet could not be glossed over by the words "about" or "more or less" in any such way as to cover 17,000,000 feet.

The case of *Woodenware Co.* v. *United States*, (106 U. S. 432,) is decisive of the law in this connection. That was also an action of trover brought by the United States for the value of 242 cords of ash timber cut from the Oneida reservation in the State of Wisconsin. The timber was knowingly and wrongfully taken from the reservation by Indians, and carried to a distant town, where it was sold to the Woodenware Company, which was not chargeable with any intentional wrong or misconduct or bad faith in the purchase. The timber on the ground, after it was felled, was worth twenty-five cents per cord, and at the town where the defendant bought it, $3.50 per cord. The question was whether the liability of the defendant should be measured by the value of the timber on the ground where it

was cut, or at the town where it was delivered. It was held that where the trespass is the result of inadvertence or mistake, and the wrong was not intentional, the value of the property when first taken must govern; or, if the conversion sued for was after value had been added to it by the work of the defendant, he should be credited with this addition. Upon the other hand, if the trespass be wilfully committed, the trespasser can obtain no credit for the labor expended upon it, and is liable for its full value when seized; and if the defendant purchase it in its then condition, with no notice that it belonged to the United States, and with no intention to do wrong, he must respond by the same rule of damages as his vendor would, if he had been sued. "This right" (of the recovery of the property), said the court, "at the moment preceding the purchase by defendant at Depere, was perfect, with no right in any one to set up a claim for work and labor bestowed on it by the wrongdoer. It is also plain that by purchase from the wrongdoer, defendant did not acquire any better title to the property than his vendor had. It is not a case where an innocent purchaser can defend himself under that plea. If it were, he would be liable to no damages at all, and no recovery could be had. On the contrary, it is a case to which the doctrine of *caveat emptor* applies, and hence the right of recovery in plaintiff."

The cases involving this distinction and in line with the Woodenware case are abundant, both in the Federal and State courts, and are too numerous even for citation. We do not see that the defendants are in any better position by the fact that the contracts were approved by the Commissioner of Indian Affairs, since it was not what was done in pursuance of these contracts but what was done in disregard of them, which lies at the basis of plaintiff's action. Had the contracts been adhered to, clearly there could have been no recovery. We are not called upon to explain the conduct of the government agent who superintended the cutting of this timber. It is sufficient to say, as already stated, that his acts in excess of his authority, which must have been well known to the defendants, afford them no protection. To say that all parties, including the Indians, the government agent and the defendants, may have honestly supposed that their right extended to all dead and down timber upon the lands described in the contracts, is to impute to them an ignorance of the English language. This might be ascribed to the Indians but not to the other parties. It is unnecessary to say that the defendants do not stand in a position of innocent purchasers in good faith.

It may admit of some question whether their advances of money and supplies to the Indians to carry on the logging operations was not a violation of the regulation that "each Indian shall provide his own logging outfit and supplies," but however this may be, it gives no color to the assertion that the defendants acted in good faith, since they could hardly

have failed to know that their advances must have been greatly in excess of what was needed for preparing for market less than three million feet of logs.

We regard the rule laid down in the Woodenware case, that an intentional trespasser, or a purchaser from him, shall have no credit for the labor he may have expended upon the property at the time of its conversion, as an eminently proper and wholesome one. It is, and has for many years been, notorious that under the various guises of Indian contracts, purchases of timber entries, or cutting timber for railway, mining or agricultural purposes, the timber lands of the United States are being denuded of all their substantial value by logging concerns gradually gathering to themselves all the valuable timber of the country, which Congress intended to reserve for the benefit of homestead entrymen, or the purchasers of land in small parcels. If trespassers under these circumstances were permitted to escape by the payment of the mere stumpage value of the standing timber, there would be a strong inducement upon the part of these operators to avail themselves of every opportunity of seizing this timber, since they would incur no greater liability than the payment of a nominal sum. It is only by denying them a credit for their labor expended upon it that the government can obtain an adequate reparation for this constantly growing evil, and trespassers be made to suffer some punishment for their depredations.

4. The fourth assignment is based upon the proposition that the contractors should have been allowed credit for the amount paid to the United States for stumpage on account of the 14,850,260 feet included in the verdict. The stumpage representing this quantity of timber would be $6,400.

This payment was not made to the United States in reimbursement of their claim for timber, but under regulations of the President, and under their contracts with the Indians that they would pay ten per cent of the stipulated compensation of $4 per thousand feet to the Indian Department as stumpage, which should be deducted from the price of $4 per thousand feet, and under the condition that such stumpage should go to the poor fund of the tribe, from which its helpless members might be supported. This payment was not made to the government as vendor, but to be held by the Indian Department as trustee for the benefit of helpless Indians, and was as much a part of the stipulated price to be paid for the timber as the other ninety per cent of the $4 per thousand feet.

5. The fifth objection assigns as error the exclusion by the trial court of a telegram of March 16, 1898, from the Acting Commissioner of the Land Office to The Logging Company, stating simply that the Commissioner had accepted the bond of the defendants in lieu of the logs, and that the government agent had been directed to release the logs. A like exception

was taken to a letter from the special agent of the Land Office to The Logging Company, repeating the telegrams, and stating that the logs had been released. We do not see the materiality of these papers. There is no doubt that the bonds were accepted in lieu of the logs themselves, and as security for any judgment that might be obtained. Neither the telegram nor the letter add anything to the inferences to be derived from the face of the instruments.

6. The same remark may be made as to the exclusion of certain conversations of Charles A. Smith with Indians in the fall of 1891, wherein the Indians informed him that there was a large amount of dead and down timber on the reservation which could be cut. Of course, there was, or the contract would not have been made. We fail to see that these conversations have any bearing upon the question of the good faith of the defendants. The seventh, eighth and ninth assignments of error need no comment.

7. In the tenth assignment it is insisted that the court erred in taxing costs against the defendants. While the rule is well settled that costs cannot be taxed against the United States, the rule is believed to be universal, in civil cases at least, that the United States recover the same costs as if they were a private individual. We know of no case in this court directly adjudicating the liability of unsuccessful defendants for costs in actions brought by the United States, although it was assumed in *United States* v. *Sanborn*, (135 U. S. 271, 281,) where the question arose as to particular fees included in a general bill. Throughout the elaborate opinion of Mr. Justice Harlan the liability of the defendant for costs was assumed, and such has been the ruling generally in the lower courts, although the reported cases upon the subject are rare. (*United States* v. *Davis*, 54 Fed. Rep. 147.) It has been assumed rather than decided.

8. The item of $353.69, reporter's fees for a transcript of the record used by the plaintiff in preparing its bill of exceptions on the former appeal, was improperly allowed.

By R. S. section 983, "lawful fees for exemplications and copies of papers necessarily obtained for use on trials in cases where by law costs are recoverable in favor of the prevailing party, shall be taxed by the judge or clerk of the court;" and by rule 31, subdivision 3, of the Circuit Court of Appeals, "the cost of the transcript of the record from the court below shall be taxable in that court as costs in the case." It has been held in a number of cases that section 983 did not include a transcript of the evidence for the personal use of counsel in preparing a case for an appellate court. *Wooster* v. *Handy*, (23 Fed. Rep. 49, 60,) by Judge Blatchford, who says the language implies that the copies must have been actually used on or in the trial or final hearing, or at least obtained for such use. In *The William*

Branfoot, (52 Fed. Rep. 390, 395,) it was held by Mr. Chief Justice Fuller that a copy of the official stenographer's notes, obtained for libellant by his counsel, was simply for convenience, and not a copy necessarily used on the trial, and the charge therefor was properly rejected. To the same effect are *Gunther* v. *Insurance Co.*, (10 Fed. Rep. 830;) *Kelly* v. *Springfield Railway Co.*, (83 Fed. Rep. 183,) and *Monahan* v. *Godkin*, (100 Fed. Rep. 196.) This error, however, does not render it necessary to reverse the judgment of the court below. The amount of the reporter's fees, $356.69, may be deducted from the judgment.

In conclusion, we are of opinion that there was no error committed upon the last trial. The case was an aggravated one, the conduct of the companies wholly indefensible, and the right of the government to recover is entirely clear.

The judgment of the Court of Appeals, subject to the above deduction, is right, and it is, therefore,

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.